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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RONALD MASTERS,

Petitioner,

v.

DANIEL INTERNATIONAL CORPORATION, et al.

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Tenth Circuit

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QUESTIONS PRESENTED FOR REVIEW

Whether a nuclear civil Quality Control inspector's state common law claim for retaliatory discharge from employment is preempted by §210 of the Energy Reorganization Act.[1]

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[1] This was the issue presented to and stated by the Tenth Circuit in its opinion. However, the last sentence of the opinion is not limited to a state law claim for retaliatory discharge but rather "any state law claim for wrongful termination." If this is not mere dicta, and to the extent the opinion purports to decide issues not presented, e.g. whether a state common law claim for fraud, or wrongful interference with contract, etc., is preempted, then petitioner has been denied the opportunity to be heard on those issues, violating due process requirements under the Fifth Amendment (U.S. Const. Bill of Rights, art. 5). Had petitioner been given the opportunity to be heard on those issues, he would have and does hereby raise three additional issues: (1) Whether such decision would violate Article III separation of powers. (2) Whether such decision would violate petitioner's Seventh Amendment (U.S. Const. Bill of Rights, art. 7) and state (Kan. Const. Bill of Rights, §5) right to trial by jury where Congress creates an administrative remedy with no right to jury trial, and then that administrative remedy is judicially determined to preempt all state common law claims to which the right to jury trial attaches. (3) Whether such decision would violate state (Kan. Const. Bill of Rights, §18) and federal (U.S. Const. Bill of Rights, art. 5) due process requiring a quid pro quo when a common law remedy is replaced with a legislatively created administrative remedy.

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REPORT OF OPINIONS

The decision below is reported at Masters v. Daniel International Corporation, 895 F.2d 1295 (10th Cir. 1990).

JURISDICTION

The opinion of the Court of Appeals was entered on February 6, 1990. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 210 of the Energy Reorganization Act:

"42 U.S.C. §5851. Employee Protection.

"(a) Discrimination against employee

"No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)---

"(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

"(2) testified or is about to testify in any such proceeding or;

"(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 et seq.].

"(b) Complaint, filing and notification

"(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

"(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

"(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may

order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

"(c) Review

"(1) Any person adversely affected or aggrieved by an order issued under subsection (b) of this section may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of Title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

"(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

"(d) Jurisdiction

"Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

"(e) Commencement of action

"(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

"(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

"(f) Enforcement

"Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of Title 28.

"(g) Deliberate violations

> "Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 et seq.]."

As noted in footnote 1. to the Question Presented, if the decision below decides preemption of "any state law claim," then petitioner has been denied the opportunity to be heard on that issue, violating his right to due process of law under U.S. Const., Bill of Rights, art. 5, which provides in pertinent part:

> "No person shall be ... deprived of ... property without due process of law;"

Had the question of whether 42 U.S.C. §5851 preempts "any state law claim" been raised, then petitioner would have and does hereby raise the issue of whether such decision would violate separation of powers principles inherent in U. S. Const., Article III, which provides:

> "The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office."

Further, whether such a decision would infringe his right to trial by jury under U. S. Const., Bill of Rights, art. 7, which provides in pertinent part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, ..."

and his right to trial by jury in §5 of the Bill of Rights to the Constitution of the State of Kansas, which provides: "The right of trial by jury shall be inviolate."

Finally, petitioner raises the issue of whether his state and federal right to due

process requires a quid pro quo when a common law remedy is replaced with a legislatively enacted administrative remedy. Federal due process arises under the 5th Amendment quoted hereinabove. State due process arises under §18 of the Bill of Rights of the Constitution of the State of Kansas, which provides:

> "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

STATEMENT OF THE CASE

Ron Masters was employed by Daniel International Corporation (DIC) as a civil quality control inspector on December 20, 1980, in Tennessee. He received excellent reviews and was selected for transfer to the Wolf Creek Nuclear Power Station in Kansas which was under construction by DIC. Masters alleged his employment was

terminated August 22, 1984, in retaliation for having reported to the Nuclear Regulatory Commission (NRC) the failure of his employer, DIC, to inspect structural steel welds and his employer's falsification of structural steel blueprints during the construction of Wolf Creek.

Masters' Complaint alleged that in February, 1984, he was instructed to inspect and "close out" structural steel welds in the fuel building at the Wolf Creek Nuclear Generating Station. (Complaint, paragraph 6). During the inspection process, Masters discovered many of the welds had been embedded in concrete and there was no documentation that the welds had been inspected. (Complaint paragraphs 7 and 9). The procedure for certifying a weld inspection would be to mark on the structural steel blueprint and initial that the inspection had been done.

(Complaint paragraph 8). When plaintiff's supervisors learned that the welds had not been inspected, they took the structural steel blueprints from plaintiff and marked and initialed them as if the welds had been originally inspected. (Complaint paragraph 10).

On February 2, 1984, Masters, in conformity with his duty as an inspector under Federal law[2], informed the Nuclear Regulatory Commission's site representative of DIC's activities. (Complaint paragraph 11). Thereafter, DIC engaged in a campaign of harassment and intimidation of Masters until his employment was terminated on August 22, 1984, in retaliation

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[2] See 10 C.F.R. Part 50.

for his report to the NRC. (Complaint paragraph nos. 12 in Count I and Count II).

The NRC did investigate Masters' concerns and eventually in a written report dated October 7, 1985, the NRC concluded:

> "It is OI's (Office of Investigations) conclusion that Q.C. (Quality Control) inspection drawings were intentionally falsified."
>
> (Supplement to Motion to Alter or Amend, Doc. #49, 5/15/87, attachment, page 2).

Masters also reported DIC's campaign of intimidation and harassment against him. The NRC also investigated this allegation, and in the same written report dated October 7, 1985, concluded:

> "DIC supervisors, EPPERLY and MURPHY, did intentionally harass and discriminate against MASTERS....
>
> [Id., attachment at p. 22 (page 19 of the report)].

Masters did not file a claim with the Department of Labor within thirty days of his discharge as required by 42 U.S.C. §5851, basically because he was unaware that he needed to do so when DIC told him he was being laid-off rather than fired. (Plaintiff's Fourth Supplement To Motion To Alter Or Amend, Doc. #53, 6/23/87, affidavit attached).

Upon termination of his employment at Wolf Creek, Masters and his family moved to Illinois. There after a few months Masters visited with an attorney who, within one year of Masters' termination of employment, on August 22, 1985, filed this action in the United States District Court for the District of Illinois, alleging diversity of citizenship, 28 U.S.C. §1332, as the basis for jurisdiction. (Complaint paragraph 1). Three causes of action were alleged: (1) retaliatory discharge, (2) tort of outrage (intentional infliction of

emotional distress), and (3) violation of civil rights. DIC moved to dismiss on the grounds that, inter alia, all counts were preempted by 42 U.S.C. §5851. The Illinois District Court dismissed Count III, civil rights, for absence of an allegation of state action, and ordered venue transferred to Kansas for determination of the remainder of the motion to dismiss.

On April 24, 1987, the district court for the District of Kansas, Rogers, J., dismissed the remainder of the case for failure to state a claim upon which relief could be granted. (Memorandum and Order, Doc. #44, 4/24/87). The court dismissed Count I, retaliatory discharge, on the grounds Kansas law would not recognize a common law cause of action where there was another remedy. The court dismissed Count II, tort of outrage, on the grounds the conduct alleged did not amount to the tort of outrage as a matter of law. The dis-

trict court entered judgment for DIC on April 24, 1987.

Within ten days, on May 4, 1987, Masters filed a Motion To Alter Or Amend The Judgment. (Motion To Alter Or Amend, Doc. #46, 5/4/87).

On February 25, 1988, Masters' motion was granted in part and denied in part. (Memorandum and Order, Doc. #55, 2/25/88). The court's earlier order of dismissal of 4/24/87 was amended to a dismissal without prejudice, but the court adhered to its decision that plaintiff did not have a cause of action for retaliatory discharge under Kansas law; the district court refused to certify such question for determination by the Kansas Supreme Court, and further held for the first time that even if plaintiff did have a cause of action under state law then it was preempted by federal law, 42 U.S.C. §5851,

notwithstanding the unavailability of punitive damages and the short thirty (30) day statute of limitations.

Masters timely appealed to the United States Court of Appeals for the Tenth Circuit, raising two issues: (1) whether 42 U.S.C. §5851 preempts his state common law cause of action for retaliatory discharge, and (2) whether Kansas recognizes a cause of action for retaliatory discharge.

While the appeal to the Tenth Circuit was pending, and in fact within one month of the district court's decision on the motion to alter or amend, the Kansas Supreme Court recognized a common law cause of action for retaliatory discharge. See Palmer v. Brown, 242 Kan. 893, 752 P.2d 685 (1988).

On February 6, 1990, the Tenth Circuit issued its opinion affirming the ruling that Masters' state tort claim was pre-

empted by the "whistleblower" provision of the Energy Reorganization Act, 42 U.S.C. §5851.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. A NUCLEAR CIVIL QUALITY CONTROL INSPECTOR'S STATE COMMON LAW CLAIM FOR RETALIATORY DISCHARGE FROM EMPLOYMENT IS NOT PREEMPTED BY §210 OF THE ENERGY REORGANIZATION ACT.

A. This Court Recently Granted Certiorari In English v. General Electric Concerning Preemption Of State Claims By §210 Of The Energy Reorganization Act; There Is A Conflict Among The Courts On This Question.

This Court grants certiorari when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. Federal courts of appeal are divided on the issue of whether §210 of the Energy Reorganization Act preempts state law tort claims involving retaliato-

ry or wrongful discharge.[3] This Court recently granted certiorari in English v. General Electric Co., 871 F.2d 22 (4th Cir. 1989), cert. granted, 110 S.Ct. 862, 107 L.Ed.2d 946, to resolve this conflict. The facts in English are similar to the present case; moreover, the question for review is the same. This Court must grant certiorari herein so that Mr. Masters and the Tenth Circuit have the benefit of this Court's decision in English.

In English, plaintiff brought a state law tort claim for intentional infliction of emotional distress. The claim arose

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[3] Several jurisdictions have addressed the preemption issue involved in the present case. Some have found preemption: English v. General Electric Co., 683 F.Supp. 1006 (E.D. N.C. 1988), aff'd per curiam on basis of the decision below, 871 F.2d 22 (4th Cir. 1989), cert. granted,

(Continued on following page)

from her termination and harassment after she reported safety violations to the NRC. The Fourth Circuit Court of Appeals found her claim was preempted. Certiorari has been granted. Masters hereby incorporates the argument and authorities in the Petition for Certiorari filed by petitioner and in the Brief For The United States As Amicus Curiae filed by the Solicitor General in English.

B. The Decision Below Conflicts With Applicable Decisions Of This Court.

This Court has also granted certiorari in cases when a federal court of appeals has decided a federal question in a way in

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110 S.Ct. 862, 107 L.Ed.2d 946; Snow v. Bechtel Const., Inc., 647 F.Supp. 1514 (C.D. Cal. 1986); Chrisman v. Philips Indus., Inc., 242 Kan. 772, 751 P.2d 140 (1988). Others have not: Norris v. Lumberman's Mut. Cas. Co., 881 F.2d 1144 (1st Cir. 1989); Garg v. Narron, 710 F.Supp. 1116 (S.D. Tex. 1989); Gaballah v. P.G.&E., 711 F.Supp. 988 (N.D. Cal. 1989); Wheeler v. Caterpillar Tractor Co., 108 Ill.2d 502, 92 Ill.Dec. 561, 485 N.E.2d 372 (1985), cert. den., 475 U.S. 1122, 106 S.Ct. 1641 (1986).

conflict with applicable decisions of this Court. The holding of the Tenth Circuit below is contrary to this Court's controlling decisions. In Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 78 L.Ed.2d 443, 104 S.Ct. 615 (1984), the Court analyzed the requirements for preemption in the nuclear field. The Court cited Pacific Gas & Electric v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 75 L.Ed.2d 752, 103 S.Ct. 1713 (1983), saying:

> "Congress...intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant."

Silkwood, 464 U.S. at 249, 104 S.Ct. at 622. Masters' case does not concern regulation of the radiological safety aspects of a nuclear plant. To the extent respondent might argue that it could do so in a collateral way, it certainly concerns

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those aspects in a way far more remote than the state tort remedies for radiation injuries at issue in Silkwood.

In Silkwood, this Court refused to recognize Kerr-McGee's contention that allowance of state tort claims for punitive damages would have the effect of punishing and deterring "conduct related to radiation hazards" and therefore would be within the "nuclear safety area". Id. The Court said:

> "It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards but that regulatory consequence was one congress was quite willing to accept." (emphasis added).
>
> Id., 464 U.S. at 256.

Silkwood concluded that state tort claims are not preempted by the Atomic

Energy Act, 42 U.S.C. §2011 et. seq. A state tort claim for retaliatory discharge from employment is less intrusive than a negligence or strict liability claim.

Kansas recognizes the tort of retaliatory discharge. Palmer v. Brown, 242 Kan. 893, 752 P.2d 685 (1988). This cause of action does not necessitate invasion of the NRC's authority to regulate safety matters. In defining the cause of action, the Kansas Supreme Court said:

> "To maintain such action, an employee has the burden of proving by clear and convincing evidence, under the facts of the case, a reasonably prudent person would have concluded the employee's co-worker or employer was engaged in activities in violation of rules, regulations, or the law pertaining to public health, safety, and the general welfare; the employer had knowledge of the employee's reporting of such violation prior to discharge of the employee; and the employee was discharged in retaliation for making the report."

> Id., 242 Kan. at 900, 752 P.2d at 690.

Thus, retaliatory discharge cases boil down to a basic discrimination case wherein the employee proves a reasonably prudent person would have concluded that the employer was violating the law, that the employee reported same, and that the employee was discharged in retaliation for doing so. The employer will inevitably contend the discharge was motivated by other legitimate reasons, and the employee will need to show those reasons were pretextual. If as held in Silkwood Congress did not intend to preempt state tort remedies for radiation torts, certainly Congress did not intend to preempt state tort remedies for employee discharge.

Protecting the residual powers and sovereignty of the states is the very essence of federalism, and this Court has consistently protected state tort law from

federal preemption absent unavoidable conflict with federal law. Nader v. Allegheny Airlines, 426 U.S. 290, 48 L.Ed.2d 643, 96 S.Ct. 1978 (1976); Askew v. American Waterways Operators, 411 U.S. 325, 36 L.Ed.2d 280, 93 S.Ct. 1590 (1973).

In cases under the Labor Management Relations Act (LMRA) or the National Labor Relations Act (NLRA), the preemption doctrine has developed by judicial decision because of the perceived need for a national labor relations policy warranting a broader than usual preemptive reach for federal law. Although this is neither an LMRA nor an NLRA case, distinctions developed in this area can provide a useful indication of the extreme limits of preemption in an area preempted by Congress. In this field, as elsewhere, this Court has consistently preserved against preemption the right of the states to enforce

traditional common law remedies, including punitive damages, for tortious conduct. See United Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656, 98 L.Ed. 1025, 74 S.Ct. 833 (1954) ($100,000 punitive damages on a state tort claim for what was also an unfair labor practice). This preservation of state tort law applies not only to damage actions for direct physical harm, as was involved in Silkwood, but even extends to such other torts as libel, Linn v. United Plant Guard Workers, 383 U.S. 53, 15 L.Ed.2d 582, 86 S.Ct. 657 (1966), intentional infliction of emotional distress, Farmer v. United Brotherhood of Carpenters and Joiners, 430 U.S. 290, 51 L.Ed.2d 338, 97 S.Ct. 1056 (1977), and tortious interference with employee's lawful occupation, International Union, U. A., A. & A. I. W. v. Russell, 356 U.S. 634, 2 L.Ed.2d 1030, 78 S.Ct. 932

(1958) (in case subject to NLRA, state court could award compensatory and punitive damages for tortious conduct which was also an unfair labor practice and for which NLRB could award back pay; no conflict in state and federal remedies).

See particularly: Lingle v. Norge Division of Magic Chef, 486 U.S. 399, 100 L.Ed.2d 410, 108 S.Ct. 1877 (1988) (state tort action for wrongful discharge not preempted by the NLRA); Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) (no preemption under NLRA for retaliatory discharge for filing worker's compensation claim); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), cert. den., 471 U.S. 1099, 105 S.Ct. 2319, 85 L.Ed.2d 839 (1985) (no preemption under LMRA for retaliatory discharge for whistleblowing).

Section 210 does not, of course, contain an express preemption provision. The statute itself repeatedly uses the

permissive "may" language. Congress has not totally occupied the field in the nuclear industry. Silkwood, supra. Masters' tort claim against his former employer is fully consistent with §210, does not pose an irreconcilable conflict with §210, and does not tend to frustrate the objectives of §210. International Union, U. A., A. & A. I. W. v. Russell, supra.; California Coastal Commission v. Granite Rock Co., 480 U.S. 572, 94 L.Ed.2d 577, 107 S.Ct. 1419 (1987). It is not impossible to comply with both federal and state law. Garner v. Teamsters, C. & H. Union, 346 U.S. 485, 98 L.Ed. 228, 74 S.Ct. 161 (1953). The state tort law on which Masters bases his claim does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in §210. Michigan Canners and Freezer Assoc., Inc. v. Agricultural Mktg.

& Bargaining Bd., 467 U.S. 461, 81 L.Ed.2d 399, 104 S.Ct. 2518 (1984). Indeed, express congressional disapproval of employer practices in §210 is consistent with an increased insistence upon state tort liability, and is inconsistent with permitting the employer to use §210 as a complete shield against liability herein. Preemption twists the "employee protection" provisions of §210 into employer protection.

II. IF THE DECISION BELOW DECIDES PREEMPTION OF ANY STATE LAW CLAIM, THEN PETITIONER HAS BEEN DENIED DUE PROCESS OF LAW IN THAT HE HAS BEEN DENIED THE OPPORTUNITY TO BE HEARD ON THAT ISSUE, AND SUCH DECISION WOULD VIOLATE FEDERAL AND STATE CONSTITUTIONAL RIGHTS IN THE FOLLOWING THREE WAYS.

As indicated in the footnote to the Question Presented, the issue presented to the Tenth Circuit was: "Is a nuclear civil quality control inspector's state common law claim for retaliatory discharge

against his employer preempted by 42 U.S.C. §5851?" (See Brief of Appellant, emphasis added). In its Opinion, the Tenth Circuit stated the issue: "Whether a state law claim for retaliatory discharge in response to an employee making safety related complaints to the Nuclear Regulatory Commission is preempted by 42 U.S.C. §5851 is a matter of first impression in this circuit." (Opinion at p. 2, emphasis added). Yet, at the end of its Opinion, the Tenth Circuit said "...the Court concludes that Section 210 of the Energy Reorganization Act, 42 U.S.C. §5851 preempts any state law claim for wrongful termination for reporting safety violations under the Act." (Opinion at p. 4, emphasis added). If this is not mere dicta, and if the opinion below purports to decide issues not presented, then Masters was never given the opportunity to

be heard on whether §210 preempts any state law claim,[4] denying him due process of law. Had that question been raised, then Masters would have and does hereby raise the following issues.

A. Such A Decision Would Violate Article III Separation Of Powers.

This is not a case in which the Government is involved in its sovereign capacity under a statute creating new "public rights," which may be assigned to an administrative agency without violating the constitutional mandate of separation of powers in Article III. In Northern Pipeline Construction Co. v. Marathon

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[4] This is important because Masters has another case pending (D.C. Case No. 87-1290-C) in the United States District Court for the District of Kansas against DIC and Kansas Gas & Electric Company arising out of the termination of his employment alleging causes of action based upon the Racketeer Influenced Corrupt Organizations Act, and other state common law torts of fraud, conspiracy, and interference with contract. (See Complaint attached to

(Continued on following page)

Pipe Line Co., 458 U.S. 50, 73 L.Ed.2d 598, 102 S.Ct. 2858 (1982), this Court's lead opinion recognized "three narrow situations" where "the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers." Id., 458

(Continued from previous page)

Fifth Supplement To Motion To Alter Or Amend, Doc. #54, 9/16/87, later amended to add interference with contract). Since the instant case was dismissed without prejudice for failure to state a claim (see Memorandum and Order, Doc. #55, Rogers, J., 2/25/88 at p. 13), Masters was free to and did amend and/or refile this case pleading other causes of action in Case No. 87-1290-C. However, petitioner and respondent have been proceeding herein under the assumption that under principles of res judicata, the instant case does finally determine whether Masters' state common law action for retaliatory discharge against DIC is preempted.

U.S. at 64. Two of those exceptions, "territorial courts" (Id., 458 U.S. at 64-65) and "the power to establish and administer courts-martial" (Id., 464 U.S. at 66) are not even arguably applicable here. The third encompasses legislative courts and administrative agencies created by Congress to adjudicate cases involving "public rights." This "public rights"

> "doctrine extends only to matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative department,' Crowell v. Benson, 285 U.S. 22, 50 (1932), and only to matters that historically could have been determined exclusively by those departments, see Ex parte Bakelite Corp., supra, [279 U.S.] at 458."
>
> Id., 458 U.S. at 67.

This suit seeking private damages for a common law tort is a wholly private tort case. Congress cannot create an administrative remedy which a court can constitu-

tionally hold to be exclusive and preemptive of all state common law tort remedies, without running afoul of Article III principles protecting the role of the independent federal judiciary within the constitutional scheme of tripartite government.

B. Such A Decision Would Violate Federal And State Constitutional Guarantees Of The Right To Trial By Jury.

Had the question of preemption of <u>any</u> state law claim been raised, then Masters would have and does hereby raise the issue of whether his Seventh Amendment (U.S. Const. Bill of Rights, art. 7) and state (Kan. Const. Bill of Rights, §5) right to trial by jury is violated.

Where Congress creates an administrative remedy with no right to jury trial, and then such administrative remedy is judicially determined to preempt all state common law claims to which the constitutional right to jury trial attaches, then

that right is infringed. See Crowell v. Benson, 285 U.S. 22, 51-65, 52 S.Ct. 285, 76 L.Ed. 598 (1932), where the Court said: "On the common law side of the federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself." Id., 285 U.S. at 51. Crowell indicates that in cases involving only "private rights," the Court will accept fact-finding by an administrative agency, without a jury, only as an adjunct to an Article III court.[5] When a federal statute embraces a common law form of action

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[5] 42 U.S.C. §5851 nowhere provides for an appeal to or review in a district court where a jury trial might be allowed. The only sort of intervention by a court at any stage of the proceedings is provided in subsection (c), providing for review in the Court of Appeals, and in subsection (e), allowing suit in district court solely for enforcement of the Secretary's order.

> "that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in action for debt still prevails whatever modern name may be applied to the action. To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments. It is by such methods that courts lose their power to enforce the Bill of Rights."

United States v. Jepson, 90 F.Supp. 983, 986 (D.N.J. 1950) (emphasis added). Cf. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 81 L.Ed. 893, 57 S.Ct. 615 (1937) (Seventh Amendment not applicable to suit deciding commission of unfair labor practice because it was a statutory proceeding unknown to the common law).

C. Such A Decision Would Violate Federal And State Constitutional Guarantees Of Due Process Because $210 Does Not Provide A Fair Quid Pro Quo.

Had the question of preemption of any state law claim been raised, then Masters

would have and does hereby raise the issue of whether his state and federal right to due process requires a fair quid pro quo when a common law remedy is replaced with a legislatively enacted administrative remedy---a question left unanswered by Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

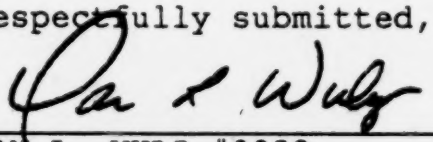
Where Congress creates an administrative remedy which is judicially determined to preempt all state common law claims to which the constitutional right to due process attaches, then that right is infringed unless a fair quid pro quo is allowed. Constitutional due process in Kansas requires a quid pro quo. Samsel v. Wheeler Transport Services, Inc., --- Kan. ---, --- P.2d ---, 1989 WL 200337. As concerns federal due process, that question was left unanswered in Duke Power Co., supra.

Here, if all state common law torts are held to be preempted by §210, then Masters has lost: his constitutional right to trial by jury, the right to claim punitive damages, and most importantly the practical right to any remedy at all because of the unfairly short 30-day statute of limitations in §210. In exchange for these losses, the only quid pro quo offered by a §210 administrative procedure and not available in court in this case is attorneys' and expert witness fees. And of course this is quite a hollow exchange when claims are barred by the 30-day period of limitation in §210. Actually, §210 operates as a trap for the unwary, as a black hole sucking in and destroying legitimate employee claims by virtue of its 30-day period of limitation. This is hardly a fair quid pro quo.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that the Court grant this Petition and issue its writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the opinion of that court in Petitioner's case.

Respectfully submitted,



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APPENDIX

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(Filed 2/6/90)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RONALD MASTERS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 88-1345
	)	(D.C. No.
DANIEL INTERNATIONAL CORP.,	)	86-4258-R)
	)	
Defendant-Appellee.	)	

JUDGMENT
Entered February 6, 1990

Before McKAY and TACHA, Circuit Judges, and RUSSELL, District Judge.*

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*Honorable David L. Russell, United States District Judge for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court
ROBERT L. HOECKER, Clerk
By: Patrick Fisher
Chief Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RONALD MASTERS, Appellant,	)	
-vs-	)	No. 88-1345
DANIEL INTERNATIONAL CORPORATION, Appellee.	)	

Appeal from the United States District Court for the District of Kansas (D.C. 86-4268-R)

Dan L. Wulz, Bryan, Lykins, Hejtmanek & Wulz, Topeka, Kansas, Attorneys for Appellant

Leonard J. Spooner of Thompson, Mann and Hutson, Greenville, SC, Lizabeth Lee Walther, Thompson, Mann and Hutson, Washington, D.C., and Arthur E. Palmer of Goodell, Stratton, Edmonds & Palmer, Topeka, Kansas, Attorneys for Appellee

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Before McKAY and TACHA, Circuit Judges, and RUSSELL, District Judge.*

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*Honorable David L. Russell, United States District Judge for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

The appellant Ron Masters brought this action for retaliatory discharge in the district court alleging that his former employer appellee Daniel International Corporation ("Daniel") terminated him for having reported safety related

concerns to the Nuclear Regulatory Commission ("NRC").

This appeal is from a decision of the district court dismissing Masters' claim on the basis that the claim was preempted by Section 210 of the Energy Reorganization Act 42 U.S.C. §5851.

The facts as alleged by Masters are that on February 2, 1984 he notified the NRC of his safety related concerns about work he was doing at the Wolf Creek Nuclear Generating Station in Kansas. Ultimately the NRC's investigation vindicated Masters complaint. In the meantime Masters was terminated by Daniel allegedly for being a whistleblower.

Masters did not file a claim with the Department of Labor within thirty days of his termination as required by 42 U.S.C. §5851(b)(1); rather, he later brought this action for retaliatory discharge.

Whether a state law claim for retaliatory discharge in response to an employee making safety related complaints to the Nuclear Regulatory Commission is preempted by 42 U.S.C. §5851 is a matter of first impression in this circuit. Other circuits which have ruled on this issue have reached differing conclusions.

In English v. General Electric Co., 871 F.2d 22 (4th Cir. 1989) the Court found that the Energy Reorganization Act was intended by Congress to be the exclusive remedy for employees who allege discrimination resulting from safety complaints and that state law claims were thus preempted. In Snow v. Bechtel Construction, Inc., 647 F.Supp. 1514 (C.D. of Calif. 1986) that court also concluded that state law claims were preempted, but based on the premise that primarily safety concerns were being addressed by the

Energy Reorganization Act and that in accord with Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 212, 103 S.Ct. 1713, 1726, 75 L.Ed.2d 752, 770 (1983), "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited power expressly ceded to the states." In Snow the Court drew a corollary between the "whistleblower" provision of § 5851 and the Mine Safety and Health Act, 30 U.S.C. § 820, which are quite similar. In Olguin v. Inspiration Consol. Copper Company, 740 F.2d 1468 (9th Cir. 1984) that court found that the "whistleblower" provision of the Mine Safety and Health Act was an exclusive remedy and preempted state action. Also see Chrisman v. Philips Industries, Inc., 751 P.2d 140 (Kan. 1988).

To the contrary in Norris v. Lumberman's Mutual Casualty Co., 881 F.2d 1144 (1st Cir. 1989) the court concluded that the Energy Reorganization Act did not preempt state law claims. In accord with this position also see Gaballah v. Pacific Gas and Electric Co., 771 F.Supp. 988 (N.D. Cal. 1989); Stokes v. Bechtel North American Power Corp., 614 F.Supp. 732 (N.D. Cal. 1985); Wheeler v. Caterpillar Tractor Co., 485 N.E.2d 372 (1985 Ill.).

After review of the cited cases and the opinion of the District Court the Court concludes that Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851 preempts any state law claim for wrongful termination for reporting safety violations under the Act.

The Court therefore AFFIRMS the district court's order dismissing the complaint.

The mandate shall issue forthwith.

ENTERED BY THE COURT PER CURIAM

(Filed 2/25/88)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

RONALD MASTERS, Plaintiff,	)	
vs.	)	Case No. 86-4268-R
DANIEL INTERNATIONAL CORPORATION, Defendant.	)	

MEMORANDUM AND ORDER

This matter is presently before the court upon plaintiff's motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 59. Plaintiff has requested oral argument but the court deems it unnecessary. Having carefully reviewed the materials before the court, we are now prepared to rule.

Plaintiff originally filed this action in federal court in Illinois. In his complaint, he alleged that he was

discharged by the defendant from his position as structural weld inspector at the Wolf Creek Nuclear Power Plant located near New Strawn, Kansas, in retaliation for reporting safety hazards at the plant to the Nuclear Regulatory Commission. The complaint contained the following causes of action: (1) a retaliatory discharge claim; (2) an intentional infliction of emotional distress claim; and (3) a civil rights claim. The federal district judge in Illinois dismissed plaintiff's third cause of action and transferred the case to this court pursuant to 28 U.S.C. §1404(a). The defendant had also sought dismissal of plaintiff's two claims, but the Illinois judge held those arguments in abeyance for a decision by this court.

On April 24, 1987, the court granted defendant's motion for dismissal of the remaining claims. We held that, under

Kansas law, plaintiff had failed to state a claim upon relief could be granted under either a retaliatory discharge theory or an intentional infliction of emotional distress theory. We determined that plaintiff could not assert a retaliatory discharge claim because he had a remedy available to him under Section 210 of the Energy Reorganization Act, 42 U.S.C. §5851. In addition, we found that plaintiff's allegations of harassment and termination from employment were insufficient to state a claim for intentional infliction of emotional distress.

Plaintiff filed the instant motion on May 4, 1987. In this motion, plaintiff argues that the court should reconsider its decision on his retaliatory discharge claim based on facts developed during discovery. In the alternative, plaintiff asks that the court certify the question

of whether he has stated a retaliatory discharge claim to the Kansas Supreme Court pursuant to K.S.A. 60-3201 et seq. Plaintiff followed this motion with a "supplement" on May 5, 1987. This first "supplement" suggested that the court's judgment in this case violated plaintiff's right to a remedy "by due course of law" as guaranteed by the Kansas Constitution and the United States Constitution. Defendant filed its response to plaintiff's motion to alter or amend on May 15, 1987. On that same date, plaintiff filed another "supplement" and "motion to vacate, suspend, stay or set aside judgment pending requested discovery and/or time to file an amended complaint." In this second supplement, plaintiff asked the court to grant its previous requests based on new information. Plaintiff also requested that, if we certified the proposed question of law, we retain jurisdiction over discovery

and/or time to file an amended complaint alleging fraud, conspiracy and/or a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et seq. (RICO). Plaintiff filed yet another "supplement" on May 20, 1987. In this third supplement, plaintiff first asked the court to specifically rule that the judgment in this case was not "on the merits." In addition, plaintiff asked the court for 45 days within which to file an amended complaint. Defendant responded with a motion to dismiss plaintiff's pleadings of May 5, 1987 and May 15, 1987 as untimely on June 1, 1987. Undeterred, plaintiff filed another "supplement" to his original motion on June 23, 1987. This fourth "supplement" consisted solely of a clarification to the affidavit filed by plaintiff with his original motion to alter or amend. Finally, plaintiff filed his last "supplement" on September 16,

1987. This fifth supplement indicated that plaintiff had filed a complaint on May 29, 1987 against Daniel International Company, Kansas Gas and Electric Company, and two individuals in federal court in Wichita alleging RICO, fraud and conspiracy claims.

This background provides a myriad of issues to decide. The court shall first address the defendant's motion to dismiss plaintiff's supplements of May 5, 1987 and May 15, 1987. The court shall also apply the arguments made therein to the later supplements filed by plaintiff. Defendant suggests that these supplements are both untimely and improper. Defendant argues that the matters raised in plaintiff's supplements are "redundant, immaterial and impertinent" to the earlier issued decided by the court. Plaintiff, in response, contends that the supplements should be considered by the court because they only

present additional arguments and authorities in support of the motion or inform the court of facts first discovered after the filing of the motion.

The Federal Rules of Civil Procedure do not recognize "supplements." Nevertheless, this court has in the past considered such pleadings when they raise only additional arguments and authorities. Several of the supplements filed by plaintiff come within this rule, and we shall consider them as part of plaintiff's Rule 59(e) motion. The court shall consider the supplements designated as "first," "second" and "fourth" under Rule 59(e). However, the "third" supplement is clearly outside the scope of additional arguments and authorities. In this supplement, plaintiff asks the court to find that its original decision was not on the merits and asks the court for 45 days in which to

file an amended complaint. This supplement goes beyond merely stating additional arguments and authorities and asks for additional affirmative relief. We shall view this supplement as a motion for relief under Fed.R.Civ.P. 60(b). Accordingly, defendant's motion to dismiss plaintiff's supplemental pleadings as untimely shall be denied.

We shall now address the merits of the arguments raised by the plaintiff in the instant motion. Plaintiff first argues that the court incorrectly concluded that he did not state a claim for retaliatory discharge under Kansas law. Plaintiff contends that the "important and fundamental public policy involved in nuclear safety and preservation of lives and property of Kansas citizens" requires that he be allowed to proceed with his retaliatory discharge claim. Plaintiff relies upon Wheeler v. Caterpillar Tractor

Co., 108 Ill.2d 502, 485 N.E.2d 372 (1985), cert. denied, 475 U.S. 1122 (1986) to bolster this argument. In the alternative, plaintiff suggests that even if we continue to adhere to the "no other available remedy" requirement for the allowance of retaliatory discharge claim, then we should require that the available remedy be adequate. Plaintiff argues that the available remedy suggested by the court here, 42 U.S.C. §5851, is inadequate because of the short period, 30 days, in which an individual must report the discriminatory treatment and the absence of the availability of punitive damages which would be allowed under Kansas law. Plaintiff contends that the facts of this case demonstrate the injustice of the 30-day limitations because the defendant misled the plaintiff into believing he was laid off rather than terminated. Finally, the plaintiff asks the court to certify the following question to the Kansas

Supreme Court if we do not believe that our prior order should be reversed:

> In a private employer/employee relationship not contractually protected by any collective bargaining agreement, where an employee is harassed, intimidated, and discharged for having reported to the NRC safety-related deficiencies and falsification of documents by his employer in the construction of the Wolf Creek Nuclear Power Plant, and such employer conduct is violative of federal law and state common law cause of action for retaliatory discharge, when federal law provides a remedy to such an employee but the remedy may be viewed as inadequate because of requisites of federal law (i.e. here, a 30-day statute of limitations) and because it does not provide remedies available under state law (i.e. here, punitive damages)?

In our order of April 24, 1987, we thoroughly examined the tort of retaliatory discharge, but we find it necessary to reiterate several points and examine several other in light of the arguments

made by plaintiff. Kansas generally follows the employment-at-will doctrine. Morriss v. Coleman Co., Inc., 241 Kan. 501, 738 P.2d 841, 847 (1987). Nevertheless, Kansas recognizes a limited public policy exception to the doctrine--the tort of wrongful or retaliatory discharge. This exception was first created and extended to employees-at-will in Murphy v. City of Topeka, 6 Kan.App.2d 488, 630 P.2d 186 (1981). Following Murphy, this court determined in Tarr v. Riberglass, Inc., No. 83-4234 (D.Kan., unpublished, 2/8/84), that an employee in Kansas must be without any other remedy under either federal or state law in order to state a retaliatory discharge claim. Plaintiff takes issue with the decision in Tarr and believes the court should reconsider its ruling.

The court believes that subsequent decisions by the Kansas Supreme Court add

support to our finding in Tarr. The Kansas Supreme Court has recognized that the holding in Murphy was "narrowly drawn" and applies only to interests protected by state law. Anco Construction Co. v. Freeman, 236 Kan. 626, 693 P.2d 1183, 1186 (1985). Moreover, the Court has refused to extend the retaliatory discharge theory to an employee covered by a collective bargaining agreement. Cox v. United Technologies, Essex Group, Inc., 240 Kan. 95, 727 P.2d 456 (1986). The key to Cox was the fact that the contractual agreement provided the employee with protective remedies and, thus, a retaliatory discharge claim was unnecessary.

In addition, many of the courts around the country that recognize the tort of retaliatory discharge have refused to allow such a claim where the employees had

statutory or administrative remedies available to them. See, e.g., Pinder v. Dean, 70 Md.App. 252, 520 A.2d 1119 (1987); Darling v. General Electric, 350 Pa.Super. 183, 504 A.2d 306 (1986); Corbin v. Sinclair Marketing, Inc., 684 P.2d 265 (Colo.App. 1984); Ohlsen v. DST Laboratories, Inc., 111 Mich.App. 580, 314 N.W.2d 699 (1981). These cases contribute some additional persuasive reasoning to the result reached in Tarr.

Plaintiff also asserts that the court should extend Tarr, if we are not inclined to reverse it, to require that other available remedies be adequate. With this requirement, plaintiff argues that the remedies provided by 42 U.S.C. §5851 are inadequate because of the absence of punitive damages and the brief period of limitations.

We are not prepared to accept plaintiff's argument for several reasons.

The court continues to believe that the focus for the purpose of determining whether to allow a retaliatory discharge claim should be on the availability of the remedy, not the adequacy of the remedy. In any event, even assuming arguendo that we accepted plaintiff's adequacy requirement, we do not believe that the result would be changed in this case. The remedies available to a complainant pursuant to 42 U.S.C. §5851 include: (1) reinstatement with compensation (including back pay); (2) compensatory damages; (3) all costs and expenses (including attorney's and witness fees); and (4) if a person fails to comply with an order issued by the Secretary of Labor, the district courts may grant all appropriate relief including injunctive relief, compensatory and exemplary damages. 42 U.S.C. §5851(b)(2)(B) and (d). In this case,

plaintiff is seeking: (1) compensatory damages; (2) punitive damages; and (3) court costs. We think the remedies provided by 42 U.S.C. §5851 are sufficient to have satisfied plaintiff's claims even though punitive damages are not allowed. The remedies provided by 42 U.S.C. §5851 go beyond what plaintiff could receive based on a retaliatory discharge claim since plaintiff could also receive attorney's fees and reinstatement. This conclusion is supported by the Kansas Supreme Court's reliance in Cox on Phillips v. Babcock and Wilcox, 349 Pa.Super. 351, 503 A.2d 36 (1986). In Cox, the Kansas court quoted the following passage from Phillips:

> Furthermore, we are not persuaded by appellant's argument that the wrongfully discharged at-will employee had greater remedies available in a civil action than does a union employee under a collective bargaining agreement since a civil court could award punitive damages. While the at-will employee may be entitled to punitive damages in a civil

> action, he does not have the ability to obtain some of the remedies available to union members; such as reinstatement to his position, which is a commonly provided remedy in labor agreements. Thus, we find that a difference in remedies is not enough to justify an extension of the coverage of the wrongful discharge action.

727 P.2d at 459 (quoting from 503 A.2d at 38).

Plaintiff's contention that the remedy of 42 U.S.C. §5851 is inadequate based on length of the limitations period is puzzling. Plaintiff suggests that a 30-day statute of limitations is inadequate to remedy the important interests at stake. Plaintiff argues that DelCostello v. International Board of Teamsters, 462 U.S. 151 (1983) supports this argument.

We wholly disagree with plaintiff's argument. Congress, which provided the remedy set forth in 42 U.S.C. §5851, believed that 30 days was sufficient, and

we do not see how this court can interfere with a policy decision made by Congress. DelCostello provides no support for plaintiff's contention. In DelCostello, the Supreme Court was faced with an issue often faced by federal courts--the statute of limitations applicable to a federal cause of action where none has been established by Congress. Here, Congress has established a limitations period, and we do not have the liberty to establish our own or find it inadequate.

Plaintiff also has taken the position that the limitations period of 42 U.S.C. §5851 should be tolled because he was misled by the defendant as to whether he had been terminated or laid off. This argument is of no moment here because §5851 would have protected plaintiff whether he was laid off or terminated. The remedies §5851 are available to "any

employee who believes that he has been discharged or otherwise discriminated against."

In addition, plaintiff raises this argument in the wrong forum. Plaintiff has never attempted to seek the remedies provided by 42 U.S.C. §5851. He could have sought such relief after the expiration of the 30-day period and made his tolling arguments to the Secretary. See, e.g., Rose v. Secretary of Dept. of Labor, 800 F.2d 563 (6th Cir. 1986). Here, plaintiff has made absolutely no efforts to pursue his claim under 42 U.S.C. §5851. Plaintiff should not be allowed to challenge the sufficiency of remedies of §5851 in this court when he has made no effort to avail himself of them.

In Cox v. Radiology Consulting Associates, Inc., 658 F.Supp. 264 (W.D.Pa. 1987), the court was faced with the same

issue presented here: should plaintiff be allowed to pursue a state wrongful discharge claim where he had a remedy available to him under 42 U.S.C. §5851 even though that remedy may now be foreclosed for his failure to timely file under §5851? The Cox court determined that Pennsylvania would decline to allow a wrongful discharge claim under these circumstances. Id., at 266. This decision, we believe, is very persuasive here due to the similarities between Kansas law and Pennsylvania law on tort of wrongful discharge. See Cox v. United Technologies, Essex Group, Inc., supra, 727 P.2d at 458-59 (citing and relying on Pennsylvania case law in the area of wrongful discharge for authority).

Plaintiff raises one final point. Relying on Wheeler v. Caterpillar Tractor Co., 108 Ill.2d 502, 458 N.E.2d 372

(1985), plaintiff asserts: "The Supreme Court of Illinois . . . reached a result contrary to that of this court in holding that Congress did not intend to preempt the field of retaliatory discharge under the Energy Reorganization Act." As pointed out by the defendant, plaintiff completely misunderstands the court's order of April 24. The court did not reach the issue of whether 42 U.S.C. §5851 preempted state claims for retaliatory discharge, although we recognized that the defendant had made such an argument. The court's order was based on the determination that the presence of an available remedy precludes the need to expand the judicially created exception of retaliatory discharge. Thus, plaintiff's suggestion that we reached a result contrary to the Illinois Supreme Court is totally incorrect. However, since we have been given another opportunity to examine this issue, we are now prepared to

hold contrary to the Illinois court as an alternative basis for our earlier decision. Based on the persuasive opinions of Snow v. Bechtel Construction, Inc., 647 F.Supp. 1514 (C.D.Cal. 1986) and the dissenting judges in Wheeler v. Caterpillar Tractor Co., supra, at 377, we conclude that §5851 preempts plaintiff's retaliatory discharge claim.

Plaintiff's contentions that the court's dismissal of his complaint violates his right to a remedy "by due course of law" as guaranteed by section 18 of the bill of rights of the state of Kansas Constitution, and his right to a jury trial under the Kansas Constitution and the United States Constitution, are clearly without merit. Section 18 of the bill of rights of the Kansas Constitution has been interpreted to mean that Kansas courts shall provide a remedy "for such

wrongs that are recognized by the law of the land." Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934, 943 (1954). Section 18 does not require courts to create a cause of action where the laws of Kansas do not recognize one. Schmeck v. City of Shawnee, 231 Kan. 588, 647 P.2d 1263, 1267 (1982). In addition, dismissal of a complaint for failure to state a claim does not violate a plaintiff's right to a jury trial under either the Kansas Constitution or the United States Constitution. See Sullivan v. United States, 788 F.2d 813, 816 (1st Cir. 1986).

Plaintiff has asked the court to certify the question of whether he has stated a retaliatory discharge claim to the Kansas Supreme Court pursuant to K.S.A. 60-3201. Certification is a discretionary function. This court has in the past employed considerable restraint before certifying questions to the Kansas

Supreme Court. See, e.g., Valdez v. Kansas State Department of Social and Rehabilitation Services, No. 76-24-C5 (D.Kan., unpublished, 1/29/82). Here, we believe that certification is inappropriate for several reasons. First, the request comes too late in the game. See Lenherr v. NRM Corp., No. 76-169-C5 (D.Kan., unpublished, 11/19/80); United States v. More, T-5331 (D.Kan., unpublished, 5/16/80). Plaintiff could have and should have requested certification long ago if he believed that this was an appropriate case. Judicial economy and efficiency would not be served by certification at this point. Second, we firmly believe that our conclusion in this case is correct. We do not wish to overburden the Kansas courts with questions that can be resolved based on their past cases. Plaintiff has not raised any persuasive argument that commands a result

different than that reached by this court. Finally, the court's reliance in this order on the preemption doctrine precludes certification. The question of whether 42 U.S.C. §5851 preempts any state claims made by the plaintiff is a matter of federal law and would be inappropriate for decision by the Kansas Supreme Court. See Snow v. Bechtel Corp., supra., at 1517-19. In sum, after consideration of the interests of judicial efficiency and economy, and federal-state comity, the court shall deny plaintiff's request for certification.

We next turn to plaintiff's motion to file an amended complaint. Actually, plaintiff has requested that he be given time to file an amended complaint. However, has since advised the court that he filed a complaint identical to his proposed amended complaint in federal court in Wichita. Therefore, the court shall

construe plaintiff's motion as one to file an amended complaint. Plaintiff seeks to file an amended complaint based on new information he received following the dismissal of his other claims.

Following an entry of judgment on the dismissal of a complaint by a district court, a plaintiff may amend the complaint under Fed.R.Civ.P. 15(a) only after the judgment has been set aside or vacated pursuant to a motion under Rule 59(e) or Rule 60(b) and leave of court to amend has been granted. Cooper v. Shumway, 780 F.2d 27, 29 (10th Cir. 1985). As noted previously, we shall consider plaintiff's motion to file an amended complaint under Rule 60(b) because the request was made more than ten days after the entry of final judgment.

Having carefully reviewed the plaintiff's contentions concerning the proposed

amended complaint, we believe that plaintiff has stated sufficient grounds to vacate the court's earlier order and allow his amended complaint to be filed. The amended complaint is based on "newly discovered evidence" and, thus, relief is appropriate under Rule 60(b)(2). Ordinarily, would we simply vacate our prior judgment and allow the plaintiff to file an amended complaint. However, plaintiff has already filed a complaint identical to the complaint he proposes to file in this court in federal court in Wichita. Under these circumstances, we shall amend our earlier order and dismiss plaintiff's complaint without prejudice. This will allow plaintiff to proceed on the complaint he filed in federal court in Wichita.

IT IS THEREFORE ORDERED that plaintiff's motion to alter or amend is hereby granted as set forth in this opinion. The

court's order of April 24, 1987 shall be amended to dismissal without prejudice.

IT IS SO ORDERED.

Dated this 24th day of February, 1988 at Topeka, Kansas.

Richard D. Rogers

United States District Judge

(Filed 4/24/87)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

RONALD MASTERS, Plaintiff,	)	
vs.	)	Case No. 86-4268-R
DANIEL INTERNATIONAL CORPORATION, Defendant.	)	

MEMORANDUM AND ORDER

This is a "whistle blower" action based on diversity jurisdiction. Plaintiff alleges that he was discharged by the defendant from his position as structural weld inspector at the Wolf Creek nuclear power plant, located near New Strawn, Kansas, in retaliation for reporting safety hazards at the plant to the Nuclear Regulatory Commission. This matter is presently before the court upon defendant's motion to dismiss.

This case was originally filed in federal court in Illinois. Plaintiff's complaint contained three causes of action. The first claim was a retaliatory discharge claim; the second claim was an intentional infliction of emotional distress claim; and the third claim was a civil rights claim based upon the United States Constitution. Judge Harold Baker of the United States District Court for the Central District of Illinois dismissed plaintiff's third cause of action and transferred the case to this district pursuant to 28 U.S.C. §1404(a). The defendant had also sought dismissal of plaintiff's first two claims, but Judge Baker held those arguments in abeyance for a decision by this court. This court shall now consider those contentions.

In the instant motion, defendant contends that Counts I and II of plaintiff's complaint do not state claims upon

which relief can be granted. Defendant contends that Kansas law does not recognize causes of action for retaliatory discharge and intentional infliction of emotional distress based upon the allegations made by the plaintiff. Defendant further argues that plaintiff's claims are preempted by Section 210 of the Energy Reorganization Act, 42 U.S.C. §5851. Finally, defendant asserts that plaintiff is estopped from bringing this action based upon a release he signed on August 22, 1984.

The court will first consider plaintiff's retaliatory discharge claim. The law in Kansas is clear that in the absence of a contract between the employer and employee which establishes the duration of employment, the employment is terminable at the will of either party. Johnson v. National Beef Packing Co., 220 Kan. 52,

551 P.2d 779, 781 (1976). There is, however, a limited exception to this rule. In Murphy v. City of Topeka, 6 Kan.App.2d 488, 630 P.2d 186 (1981), the Kansas Court of Appeals held that an employee may bring a tort action for retaliatory discharge when he is terminated for filing a workmens' compensation claim. The court stated:

> We believe the public policy argument has merit. The Workmens' Compensation Act provides efficient remedies and protection for employees, and is designed to promote the welfare of the people in this state. It is the exclusive remedy afforded the injured employee, regardless of the nature of the employer's negligence. To allow an employer to coerce employees in the free exercise of their rights under the act would substantially subvert the purpose of the act.

Id., 630 P.2d at 192.

The exact boundaries of the exception created in Murphy have yet to be determined by the Kansas courts. The courts,

however, have provided some guidelines. A review of those decisions provides some guidance for the instant case.

In Tarr v. Riberglass, Inc., No. 83-4234 (D.Kan., unpublished, 2/8/84), we held that the exception created in Murphy did not extend to an employee terminated in violation of the Kansas public policy against age discrimination. We determined that in order to state a claim of retaliatory discharge a person must meet two requirements: (1) that he was discharged in contravention of public policy; and (2) that he is without any other remedy under either federal or state law. Id. The rationale underlying these requirements is that the courts have sought to protect certain policies of the communities by providing a remedy for at-will employees who were otherwise helpless in the face of employer conduct that violated these

policies. To the extent an employee has other remedies, however, the public policy is sufficiently served and there is no need for judicial creation of new causes of action. Id.

In Wynn v. Boeing Military Airplane Co., 595 F.Supp. 727 (D.Kan. 1984), Judge Theis refused to adopt the "no other remedy available" requirement for the recognition of public policy exceptions to the Kansas employment-at-will doctrine. He held that an employee discharged because of his race could assert a retaliatory discharge claim despite remedies that existed under state and federal law. He reasoned that a retaliatory discharge action "may provide remedies not available under the federal law and does not have requisites that the federal law possesses." Id. at 729. Judge O'Connor, however, has chosen to follow the "no other remedy available" requirement estab-

lished in Tarr and declined to follow the Wynn analysis. See Polson v. Davis, 635 F.Supp. 1130, 1149-50 (D.Kan. 1986) (Murphy not extended to employee discharged because of sex or because of opposition to employer's sexually discriminatory practices); Robinson v. Colt Industries, No. 84-2472 (D.Kan., unpublished, 3/5/86) (Murphy not extended to employee discharged because of sex). In Polson, Judge O'Connor stated:

> Given the strong public Kansas policy in favor of employment-at-will, we find it unlikely that the Kansas courts would recognize an exception to this doctrine where plaintiff has an adequate remedy for the conduct complained of--even though one could conceive of a remedy offering more comprehensive relief. (emphasis in original).

635 F.Supp. at 1150

We continue to adhere to the requirement set forth in Tarr that an employee

must be without any other remedy under federal or state law in order to assert a retaliatory discharge claim under Kansas law. We continue to believe, despite Judge Theis' opinion in Wynn, that the Kansas courts would not create a further exception to the employment-at-will doctrine if an employee had an alternate remedy. The court's adherence to this belief is reinforced by a recent decision of the Kansas Supreme Court.

Following Murphy, the issue arose as to whether an employee covered by a collective bargaining agreement which provided for discharge only upon just cause and contained a mandatory grievance and arbitration procedure could assert a retaliatory discharge claim. The federal judges in Kansas reached differing results. In Sutton v. Southwest Forest Industries, Inc., 643 F.Supp. 662 (D.Kan. 1986), Judge Saffels held that an employee covered by a

collective bargaining agreement could assert a retaliatory discharge claim, while in Edwards v. Western Manufacturing, 641 F.Supp. 616 (D.Kan. 1986), Judge Kelly held that such a claim could not be asserted by an employee covered by a collective bargaining agreement. The Kansas Supreme Court settled the issue in Cox v. United Technologies, Essex Group, Inc., 240 Kan. 95, 727 P.2d 456 (1986). In Cox, the Kansas Supreme Court held that Murphy would not be extended to include employees covered by collective bargaining agreements. The Court stated:

> An employee covered by a collective bargaining agreement . . . precluding discharge except for proper cause and providing for a grievance procedure which includes binding arbitration is adequately protected contractually from retaliatory discharge. The public policy of Kansas does not require that the tort of retaliatory discharge . . . be extended to include employees covered by a collective bargaining agreement . . .

Id., 727 P.2d at 459.

The Cox case essentially affirms the position taken by this court in Tarr in that the Kansas courts will not recognize a retaliatory discharge claim where the employee has other remedies available. In Cox, the Court quoted extensively from and relied upon a decision from Pennsylvania, Phillips v. Babcock & Wilcox, 349 Pa.Super. 351, 503 A.2d 36 (1986), in which the court carefully noted that the employee covered by a collective bargaining agreement had adequate remedies available to him. The reasoning of that court has some importance to this case:

> Appellant and all like-situated employees are not without recourse when faced with indiscriminate discharge even when the discharge violates public policy. The collective bargaining agreement in this instant case provides protection

> against suspension or discharge without 'proper cause.' Surely, in pursuing a grievance under the provisions of the agreement, if appellant can show that his discharge was in retaliation for his filing a workmen's compensation claim, he will have proved that his discharge was not for 'proper cause.' It would appear, therefore, that appellant will then be entitled to the remedies provided in the agreement.
>
> Furthermore, we are not persuaded by appellant's argument that the wrongfully discharged at-will employee has greater remedies available in a civil action than does a union employee under a collective bargaining agreement since a civil court could award punitive damages. While the at-will employee may be entitled to punitive damages in a civil action, he does not have the ability to obtain some of the remedies available to union members; such as reinstatement to his position, which is a commonly provided remedy in labor agreements. Thus, we find that a difference in remedies is not enough to justify an extension of the coverage of the wrongful discharge action.

Id., 503 A.2d at 37-38.

We do, however, acknowledge that the Kansas Supreme Court, despite several

opportunities, has never actually embraced the "no other available remedy" doctrine established in Tarr. Nevertheless, the clear message of Cox is that Murphy should not be extended in situations where an employee has other remedies available. The Kansas courts have been very timid in expanding the retaliatory discharge exception to the long-established employment-at-will doctrine. This is, of course, how we feel it should be since we are dealing with a judicially created exception. The Kansas legislature should act if this exception is to be substantially expanded. Without such action, courts should be reluctant to enlarge the exception, particularly where other remedies are available.

In the instant case, there is no dispute that plaintiff had other remedies available to him. Section 210 of the

Energy Reorganization Act, 42 U.S.C. §5851, provides a federal cause of action to employees who are discharged for complaining about or reporting nuclear safety hazards in the workplace. An employee so discriminated against can obtain injunctive relief, compensatory damages and punitive damages. The remedies provided by §5851 to employees in nuclear plants are adequate. The availability of this remedy precludes the court from expanding Murphy to include the situation presented by this case. It appears that plaintiff has, unfortunately, failed to timely take advantage of the remedies provided under the Energy Reorganization Act. We do not find that this fact has any impact on our previous ruling. This court is only concerned whether other remedies were available, not whether they are still available to the employee. Accordingly, we must grant defendant's motion to dismiss Count

I of plaintiff's complaint for failure to state a claim upon which relief can be granted.

The court shall next consider plaintiff's intentional infliction of emotional distress claim. Such a claim is generally referred to in Kansas as an "outrage" claim. See Roberts v. Saylor, 230 Kan. 289, 637 P.2d 1175, 1177 (1981). Four elements must be demonstrated to establish a claim for outrage: (1) the conduct of the defendant must be intentional or in reckless disregard of plaintiff; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the defendant's conduct and plaintiff's mental distress; and (4) plaintiff's mental distress must be extreme and severe. Id., 637 P.2d at 1179. It is, however, for the court to determine if two threshold requirements have been met

before an outrage claim may be allowed to proceed. First, the court must be convinced that reasonable fact finders might differ as to whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. Second, the court must determine whether the emotional distress suffered by the plaintiff is of such extreme degree the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it. Id., 637 P.2d at 1180.

The courts in Kansas have on several occasions considered the first threshold requirement in the context of employment discharge cases. These cases have generally held that the termination of an employee does not rise to the level of conduct necessary for an outrage cause of action. See Polson v. Davis, supra, at 1150-51; Fletcher v. Wesley Medical Center, 585

F.Supp. 1260, 1262 (D.Kan. 1984); Pickert v. Kiley, No. 83-4021 (D.Kan., unpublished, 1/30/86); Mattern v. Chance Manufacturing Co., Inc., No. 82-1841 (D.Kan., unpublished, 2/9/84). As Judge Kelly stated in Fletcher:

> [T]he termination of an employee, whatever the secret motive underlying it, is the kind of event that happens every day; such an act is not even a breach of modern-day business etiquette, much less an uncivilized barbarism. Quite a bit more--such as the endless stream of vulgar, racist invective and threats of violence uttered by the defendant in Gomex v. Hug, 7 Kan.App.2d 603, 645 P.2d 916 (1982)--must accompany a firing if it is to be deemed "outrageous."

585 F.Supp. at 1262.

In accordance with the foregoing cases, we must conclude that plaintiff has failed to set forth a claim for outrage under Kansas law. Plaintiff's contention that he was harassed and terminated for reporting safety violations to the Nuclear

Regulatory Commission are insufficient to state an outrage cause of action. Accordingly, the court shall also grant defendant's motion to dismiss on Count II of plaintiff's complaint.

With the aforementioned rulings, the court finds it unnecessary to consider the other arguments raised by the defendant. Defendant's motion shall be granted and this action shall be dismissed.

IT IS THEREFORE ORDERED that defendant's motion to dismiss be hereby granted. Both of plaintiff's remaining claims are hereby dismissed for failure to state a claim upon which relief can be granted.

IT IS SO ORDERED.

Date this 24th day of April, 1987 at Topeka, Kansas.

Richard D. Rogers

United States District Judge

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CLERK

No. 89-1701

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RONALD MASTERS,
Petitioner,

v.

DANIEL INTERNATIONAL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to determine whether petitioner's state law claim is pre-empted, when prevailing authority shows that the state would not recognize petitioner's claim?

2. When a civil quality inspector employed in constructing a nuclear power plant alleges he was discharged in violation of state public policy for reporting nuclear safety violations to the NRC, is his state claim pre-empted by § 210 of the Energy Reorganization Act?

3. Do the specific remedies in the Energy Reorganization Act pre-empt general remedies under the common law?

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

As the construction of the Wolf Creek Nuclear Generating Station was drawing to a close, Masters, a civil quality inspector, received a notice of reduction of force, informing him that his employment with Daniel International Corporation [1] (Daniel) at the Wolf Creek project

[1] Daniel International Corporation is owned by Fluor Corporation, and has the following subsidiaries which are not wholly owned: Daniel Engineering, Inc.; Daniel Navarra, S.A.; and Materiales y Equipos Auxiliares para la Construccion, S.A.

would end in three weeks. Before he left the Kansas project, he obtained other employment at a nuclear power construction project in Clinton, Illinois. A year later, when he was no longer employed by the second employer, he filed suit against Daniel in Illinois alleging common law retaliatory discharge, intentional infliction of emotional distress, and a civil rights claim. The Illinois court summarily dismissed the civil rights claim for lack of state involvement, and transferred the remaining claims to the District of Kansas. The defendant moved to dismiss the remaining claims for failure to state a claim under Kansas law and because they were pre-empted by the whistleblower provisions of the Energy Reorganization Act, 42 U.S.C. § 5851.

The District Court ruled that Kansas would not recognize an additional public policy exception to the doctrine of employment at will for a plaintiff who has another remedy. App. at 21. The court ruled that the remedy provided by 42 U.S.C. § 5851 was adequate, and dismissed the claim for retaliatory discharge in violation of public policy. App. 22-26. As part I. of this Brief will show, the Kansas Supreme Court, four days later, also ruled that § 5851 provides a "substantial and effective remedy." The Tenth Circuit has since ruled that when a plaintiff has another adequate remedy, Kansas will not recognize a new public policy exception to the doctrine of employment at will.

The District Court also ruled that petitioner had failed to state a claim for intentional infliction of emotional distress. Petitioner moved to alter or amend the judgment and submitted five supplemental motions spanning several months. These motions related to his retaliatory discharge claim, but not to his claim of intentional infliction of emotional distress. In responding to the motions to alter or amend, the court ruled, as an alternative basis for the dismissal, that the wrongful discharge claim was preempted by the whistleblower provisions of the Energy Reorganization Act.

Eventually, the District Court allowed the dismissal to be without prejudice to his right to proceed under a separate action he had filed in another division of the District of Kansas, arising out of these same facts, which alleges claims under RICO and the Kansas law of civil conspiracy. The second action is pending in the District Court.

Masters appealed the dismissal of the retaliatory discharge claim. The Tenth Circuit affirmed the dismissal on the basis of pre-emption. *Masters v. Daniel International Corporation*, 895 F.2d 1295 (10th Cir. 1990). Because of its holding on the pre-emption issue, the Tenth Circuit did not reach the question of whether Masters had stated a valid claim for retaliatory discharge in violation of the public policy of Kansas.

The petitioner argues that the Tenth Circuit's holding is unconstitutionally overbroad. When he appealed to the Tenth Circuit, petitioner stated the issue, "Is a nuclear civil quality control inspector's state common law claim for retaliatory discharge against his employer preempted by 42 U.S.C. § 5851?" The Tenth Circuit's holding is that "42 U.S.C. § 5851 preempts any state law claim for wrongful termination for reporting safety violations under the Act." The respondent sees no significant difference between the petitioner's statement of the issue and the Tenth Circuit's holding. Retaliatory discharge under the Act seems to be the same as wrongful termination for reporting safety violations under the Act. The Tenth Circuit decided the issue presented, and its holding is correct. The Act pre-empts any state law claim within its bounds.

Petitioner relies extensively on this Court's granting the petition for writ of certiorari in *English v. General Electric Company*, 871 F.2d 22 (4th Cir. 1989), *cert. granted*, 493 U.S. ——, 110 S.Ct. 862, 107 L.Ed.2d 946 (1990), and asserts, "The facts in *English* are similar to the present case; moreover, the question for review is the same." Petition, Page 18.

This is simply not accurate. Granting the petition in *English* does not warrant granting the petition here. Petitioner's "Question Presented" presumes that Masters has a valid state common law claim for retaliatory discharge in violation of public policy. This is a fatal flaw in his petition.

Although both English and Masters initially filed suit alleging retaliatory discharge and emotional distress claims, the District Court in *English* found that she had stated a valid claim for intentional infliction of emotional distress, and she abandoned her retaliatory discharge claim. The District Court in *Masters* however, ruled he had not stated a valid claim under state law for retaliatory discharge or intentional infliction of emotional distress. In contrast to *English*, Masters abandoned his claim for intentional infliction of emotional distress and pursued his claim for retaliatory discharge. As part I. of this Brief will show, the District Court was correct in its determination that Masters had not stated a valid claim for retaliatory discharge in violation of public policy under Kansas law. Thus, even if this Court should rule that Masters' claim is not pre-empted, he would still have no claim under Kansas law. Moreover, Respondent objects to any attempts to "incorporate" any arguments from *English* to this action.

SUMMARY OF ARGUMENT

Kansas would not recognize a claim for retaliatory discharge in violation of public policy for petitioner's circumstances. The District Court in this action, and the Court of Appeals for the Tenth Circuit in *Polson v. Davis*, 895 F.2d 705 (10th Cir. 1990), both ruled that Kansas would not recognize a claim for retaliatory discharge if the plaintiff had another adequate remedy. The Kansas Supreme Court has ruled that the Whistleblower Act provides a "substantial and effective" remedy. *Chrisman v. Philips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140, 3

I.E.R. Cases 181 (1988). Thus, petitioner has failed to state a valid claim under Kansas law; he has no claim to pre-empt.

Congress has committed the regulation of safety aspects of nuclear power to the Nuclear Regulatory Commission. The whistleblower provisions are in the nuclear safety section of the Act, and whistleblowers perform an important safety function in the nuclear industry.

> State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done here, the test of pre-emption is whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act."

Pacific Gas & Electric v. State Energy Resources Commission, 461 U.S. 190, 212-13, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). A claim of retaliatory discharge for nuclear whistleblowing *is* "regulated by the Federal Act", and the state claim is therefore pre-empted.

A specific statutory remedy pre-empts a more general remedy. This Court has "consistently held that a narrowly tailored employee compensation scheme pre-empts the more general tort recovery statutes." *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976). The Whistleblower Act is a new, comprehensive and balanced statutory remedy directed specifically at protecting nuclear whistleblowers; it therefore pre-empts a more general remedy under the common law.

Petitioner has no claim under the law of Kansas, the Tenth Circuit properly ruled that the Whistleblower Act

governs nuclear safety and pre-empts the field, and the specific remedy under § 210 pre-empts the general remedy under the common law. Therefore, this Court should not grant the petition.

ARGUMENT

I. KANSAS WOULD NOT RECOGNIZE PETITIONER'S CLAIM

In developing the Kansas law of retaliatory discharge, the Kansas Supreme Court has indicated, but not explicitly ruled, that if a discharged employee had another adequate remedy, Kansas would not recognize an additional public policy execption to the doctrine of employment at will.

On February 6, 1990, the same day that the Tenth Circuit issued the decision below, a different panel of the Tenth Circuit issued *Polson v. Davis*, 895 F.2d 795 (10th Cir. 1990). In *Polson*, the panel unanimously ruled that the Supreme Court of Kansas would *not* allow a common law cause of action for wrongful discharge in violation of public policy to an employee who had a valid cause of action under the Kansas Acts Against Discrimination, K.S.A. § 44-1001, *et seq.* (KAAD). 895 F.2d at 709. The Tenth Circuit ruled "that plaintiff's remedies under Kansas statutory law preclude a recovery under the tort of wrongful discharge." 895 F.2d at 709. The court ruled that it must analyze the adequacy of the remedy, but rejected the theory that a mere difference in remedies was a sufficient basis for the court to recognize a new cause of action.

After analysis of the state court precedents, the Court of Appeals concluded: "Faced with the need to decide, we believe, as did the district court, that the Kansas Supreme Court would adopt the view that KAAD provides an adequate and exclusive state remedy for violations of

the public policy enunciated therein." 895 F.2d at 709. This ruling is similar to the cases of this Court, discussed in part III., which hold that if a statute provides a specific remedy, a cause of action under the general law is pre-empted.

When this Court was faced with ruling on a question of state law decided by a District Court, and affirmed by an evenly divided circuit court, this Court ruled, "In comparable circumstances, this Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop v. Wood*, 426 U.S. 341, 346, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1984). In a footnote this Court explained,

> "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." [quoting *Proper v. Clark*, 337 U.S. 472, 486-487, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949)] . . . "On such questions we pay great deference to the views of the judges of those courts 'who are familiar with the intricacies and trends of local law and practice.' [*quoting Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-630, 66 S.Ct. 445, 90 L.Ed. 358 (1946), *quoting Huddleston v. Dwyer*, 322 U.S. 232, 237, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944).]

426 U.S. at 346, n.10.

Four days after the District Court dismissed petitioner's claim for a final time, the Kansas Supreme Court ruled, like the District Court and the Tenth Circuit in this action, that a nuclear whistleblower's claim of retaliatory discharge in violation of the public policy of Kansas is pre-empted by the Whistleblower Act. *Chrisman v. Philips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140, 3 I.E.R. Cases 181 (1988). In *Chrisman*, the Su-

preme Court of Kansas, discussed the remedy afforded by § 5851:

> Section 5851 not only provides a *substantial and effective remedy* for an employee who contends he has been discharged because of "whistle-blowing," but it also provides the Federal Nuclear Regulatory Agency with invaluable information from those working in the field who are most likely to discern the problems relating to the public safety in the nuclear field. We hold that 42 U.S.C. § 5851 is primarily a safety regulation, and that Congress has pre-empted the field. *We need not determine* whether termination of an employee for "whistle-blowing" in nuclear and related industries violates state public policy or whether a further exception to the employment-at-will doctrine should be created. Congress has provided the exception by legislation, which we hold pre-empts the field (emphasis added).

3 I.E.R. Cases 185.

Based on this discussion, even if the state claim were not pre-empted, the Supreme Court of Kansas would not recognize a claim of retaliatory discharge for a nuclear whistleblower. Contrary to petitioner's suggestion, Kansas has *not* recognized a claim for his allegations. Nothing has called into question the District Court's opinion that Masters failed to state a claim for retaliatory discharge in violation of public policy under Kansas law. In fact the Tenth Circuit's decision in *Polson* and the Kansas Supreme Court's decision in *Chrisman* have bolstered the District Court's conclusion.

In this action, this Court should "pay great deference to the views" of the Senior U.S. District Judge, who ruled that plaintiff had not stated a valid claim under the law of Kansas, and to the unanimous panel of the Tenth Circuit in *Polson v. Davis*, which ruled that Kansas courts would not recognize a new public policy exception to the doctrine of employment at will when a plaintiff had an adequate remedy under a statute. If the state statute, KAAD, preempts a more general common law

claim for retaliatory discharge, then certainly the specific federal statute, the Whistleblower Act, preempts a state common law claim.

Unlike the plaintiff in *English*, Masters has *not* established a valid claim under state law.

II. THE WHISTLEBLOWER ACT PRE-EMPTS PETITIONER'S CLAIM

A. The NRC Has Exclusive Authority Over Radiological Safety

Congress has reserved to the Nuclear Regulatory Commission the "authority and responsibility with respect to regulation of—(1) the construction and operation of any production or utilization facility." 42 U.S.C. § 2021(c).

In *Pacific Gas & Electric v. State Energy Resources Commission*, this Court made an extensive review of the legislative history of the Energy Reorganization Act. The Court ruled,

> Congress, in passing the 1954 Act and in subsequently amending it, intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related State concerns.

461 U.S. at 205. Justices Blackmun and Stephens, concurring in part and concurring in the judgment, viewed the issue slightly differently, but nevertheless wrote, "Congress has occupied not the broad field of 'nuclear safety concerns,' but only the narrower area of how a nuclear plant should be constructed and operated to protect against radiation hazards." 461 U.S. at 224. Thus, all the justices agreed that Congress intended the Nuclear Regulatory Commission to govern the construction and operation of a nuclear power plant, to protect against safety hazards.

Masters bases much of his argument in the petition on *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), in which this Court ruled, 5-4, that Congress did not intend to pre-empt state law claims for radiation injuries suffered from nuclear accidents. The Court found Congressional intent for this ruling in the Price-Anderson Act which contemplated insurance for state law claims based on radiation leaks, and the implicit assumption that such claims would be available, despite the authority of the Nuclear Regulatory Commission. In addition to the Price-Anderson Act, the Court also based its decision on the fact that Congress had failed to provide any federal remedy for persons injured by radiation leaks.

In contrast to the facts of *Silkwood*, Congress has provided nuclear whistleblowers an explicit remedy under the Whistleblower Act. Furthermore, there is no corollary to the Price-Anderson Act in the realm of nuclear whistleblowers, which explicitly assumes the availability of state law remedies. In *Silkwood* the Court ruled, in effect, that the federal government had not so completely occupied the field of recovery for radiation damages, as it had the field of construction and operation of nuclear power plants. The four dissenting justices in *Silkwood* were of the opinion that the award of punitive damages was a regulatory function which properly belonged to the NRC.

Most recently this Court considered the issue of field pre-emption in the *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988). The Court ruled 8-0 that in the case of field pre-emption, when state action "presents the 'prospect of interference with the federal regulatory power,' then the state law may be pre-empted even though 'collision between the state and federal regulation may not be an inevitable consequence.' *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U.S. [84] at 91-92, 83

S.Ct. 646, 9 L.Ed.2d 601 (1963)." 485 U.S. at 310. In this action, there is not only the "prospect of interference;" interference is *inevitable.*

B. The Whistleblower Act Promotes Nuclear Safety

In enacting the Whistleblower Act, 42 U.S.C. § 5851, Congress granted protection to whistleblowers involved in the construction or operation of a federally-licensed nuclear power facility. The Act applies to "a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant." § 5851(a). A whistleblower must be employed in the construction or operation of a nuclear power facility, to have a claim under the Whistleblower Act. The Whistleblower Act is therefore a part of the federally pre-empted field of the construction and operation of nuclear power plants.

First, the Whistleblower Act furthers nuclear safety by the short limitations period. It requires that the retaliatory discrimination be brought to the attention of the NRC or Secretary of Labor, who reports it to the NRC within 30 days, so that the safety complaint can be investigated promptly and corrected if need be. Without this requirement, a whistleblower could report the safety complaint to his employer, but not to the NRC, suffer some retaliation, file suit in state court and *never* bring the safety complaint to the attention of the NRC.

Second, the employee must be participating in a proceeding under the Act, or in an "action to carry out the *purposes* of this chapter or the Atomic Energy Act of 1954, as amended" (emphasis added). § 5851(a)(3). The Whistleblower Act is in the nuclear safety section of the Energy Reorganization Act. This limitation as to the *purpose* of the whistleblowing shows that the federal remedy which Congress provided for whistleblowers furthers the pre-empted area of radiological safety in the construction and operation of nuclear power plants, and § 5851 must be construed to pre-empt state law on the subject.

Third, § 5851(g) denies a remedy to anyone who "deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended." This strict provision shows that Congress was concerned primarily, not with recovery for employees, but with nuclear safety. This protects the employer's right to discharge anyone who deliberately violates the act without fear of a vindictive lawsuit. If state claims were allowed, the state court might not recognize this provision as a defense to a state claim, thus upsetting the balance Congress created. If the state court did recognize this defense, state court juries would decide whether the conduct was a deliberate violation of the Atomic Energy Act. This would be an impermissible intrusion into the area given exclusively to the NRC.

C. Whistleblowers Promote Nuclear Safety

Congress has recognized that whistleblowers are irretrievably involved in promoting safety. This common sense relationship between whistleblowing and safety is shown in Senate Report No. 95-181, which accompanied the Federal Mine Safety and Health Amendments Act of 1977. These amendments expanded protections first offered in Public Law 91-173 relating to the health and safety of the nation's coal miners. The legislative history of the Nuclear Whistleblower Act referred specifically to the whistleblower protections in Public Law 91-173.

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.

Senate Report No. 95-181, 1977, U.S. Code Cong. & Admin. News at 3435.

Several courts have recognized that nuclear whistleblowers are intertwined with the promotion of nuclear safety. *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986) was an appeal from the Secretary of Labor's decision in favor of a nuclear whistleblower. The court analyzed the relationship between quality inspectors who are whistleblowers and the Nuclear Regulatory Commission, and recognized the connection between whistleblowing and safety.

"A properly functioning licensee quality assurance program is an integral part of the NRC's regulatory program . . . . In effect, such a program serves as the eyes and ears of the NRC because the inspectors are always on site and take over much of the inspection burden from federal personnel." 780 F.2d at 1507. The court continued:

> It is clear that what is involved here is a complaint concerning employment discrimination, a matter within the competence of the Secretary [of Labor]. It is foreseeable, however, that intertwined with an employment discrimination complaint could be matters specifically concerning substantive questions of nuclear safety which are better determined by the NRC, a body with competence on nuclear issues.

780 F.2d at 1509.

Likewise, in *English v. General Electric Co.* the court stated: "As the legislative history indicates, protecting an employee's livelihood in the nuclear industry while at the same time encouraging disclosure of potential safety hazards and violations are matters inextricably intertwined." 683 F.Supp. 1006, 1013 (E.D.N.C. 1988), *aff'd*, 871 F.2d 22 (4th Cir. 1989), *cert. granted*, —— U.S. ——, 110 S.Ct. 862, 107 L.Ed.2d 946 (1990).

The Second Circuit analyzed the relationship between the quality assurance programs and the NRC in *Norman v. Niagara Mohawk Power Corporation*, 873 F.2d 634 (2nd Cir. 1989). The court noted, "Regulations adopted

by the [Nuclear Regulatory] Commission pursuant to the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 et seq., require that certain quality assurance programs be adopted to ensure safety in the construction and operation of a plant such as Niagara's." 873 F.2d at 635. The appellants in that action were quality assurance auditors for Niagara, who reported safety violations in compliance with 42 U.S.C. § 5846. They alleged they were subjected to harassment and discrimination for reporting the safety violations. After they failed to recover under the administrative process, they filed suit under RICO. The District Court dismissed the claims and the Second Circuit affirmed, ruling that § 5851 provides the exclusive remedy for persons with nuclear whistleblower complaints. The court ruled, "We are not dealing here with a collateral matter that is only peripherally related to the safety concerns implicit in § 210." 873 F.2d at 637.

State courts have also recognized this relationship. "Section 5851 . . . provides the Federal Nuclear Regulatory Agency with invaluable information from those working in the field who are most likely to discern the problems relating to the public safety in the nuclear field. We hold that 42 U.S.C. § 5851 is primarily a safety regulation, and that Congress has pre-empted the field." *Chrisman v. Philips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140, 3 I.E.R. Cases 181, 185 (1988). Likewise, the dissent in *Wheeler v. Caterpillar Tractor Company*, 108 Ill.2d 502, 485 N.W.2d 372 (1985), recognized that the Whistleblower Act regulates "the safety aspects of nuclear energy," which is "an area traditionally governed by federal law." 485 N.W.2d at 378.

Based on this analysis, these courts have ruled that Section 5851 pre-empts all state claims that come under its provisions. In *Kansas Gas & Electric*, the court ruled, "Section 5851 of the ERA states that exclusive jurisdiction in employment discrimination matters is vested by Congress in the Secretary of Labor." 780 F.2d at 1508.

The First Circuit, which ruled that Section 5851 did not pre-empt a claim for wrongful discharge, found that the whistleblower protections were *not* safety-related. *Norris v. Lumbermen's Mutual Casualty Company*, 881 F.2d 1144, 1150 (1st Cir. 1989). Without any analysis, the *Norris* court stated, "A state law action for wrongful discharge does not affect in any way the safety standards promulgated by the Nuclear Regulatory Commission. The issue in such a case is not the efficacy of nuclear energy safety standards, but whether the plaintiff can prove whether he was wrongfully discharged." 881 F.2d at 1150.

The Fourth Circuit provided the better analysis of this issue when it ruled that the whistleblower section of the Federal Railroad Safety Act "clearly is a law 'relating to railroad safety' under [the statute]. . . . The purpose of the Act is to reduce injuries to persons and damage to property caused by railroad accidents. [Citations omitted.] Section 441 furthers these goals by protecting railroad employees who report safety violations." *Rayner v. Smirl*, 873 F.2d 60, 65 (4th Cir.), *cert. denied*, 493 U.S. ——, 110 S.Ct. 213, 107 L.Ed.2d 166 (1989).

The *Rayner* court explained:

> In one sense, of course, all the trier of fact need do in a wrongful discharge action is determine the reason for the discharge. In another sense, however, Rayner's claim of wrongful discharge for "whistleblowing" is inextricably tied to the question of precisely what railroad safety practices he was blowing the whistle on. To the extent that the justifiable nature of the whistleblowing enters the calculus in wrongful discharge actions, railroad safety laws might be subject to an unpredictable medley of jury determinations, which Congress, in its quest for national uniformity under [45 U.S.C.] § 434 sought to avoid.

873 F.2d at 66.

States have more liberty to address safety matters under the Federal Railroad Safety Act, than under the Energy Reorganization Act. "Under section 434, states generally remain free to address matters of railroad safety until pre-empted by federal action. [Citations omitted.] Once the federal government acts, however, the FRSA normally pre-empts state regulation of that subject matter." 873 F.2d at 66. The *Rayner* court ruled that the whistleblower provisions of the Federal Railroad Safety Act pre-empted an employee's state law claims based on whistleblowing.

In contrast, the NRC has exclusive control over the radiological safety aspects of nuclear power plant construction and operation, and states have no authority to supplement it. *Pacific Gas & Electric.* If a claim for wrongful discharge for whistleblowing under the Federal Railroad Safety Act is pre-empted, certainly a claim for wrongful discharge for nuclear whistleblowing is pre-empted.

In his petition Masters makes dubious assertions that his case "does not concern regulation of the radiological safety aspects of a nuclear plant," (p. 20) and "does not necessitate invasion of the NRC's authority to regulate safety matters." (p. 22) These assertions are incredible, especially in light of his argument before the District Court that he was intimately involved in nuclear safety.

> There is no public policy more important or more fundamental than the protection of the lives and property of the people of the State of Kansas from the dangers inherent in the *unsafe construction* of a nuclear power plant . . . .
>
> It is not inconceivable that plaintiff may have helped minimize the *risk of nuclear catastrophe* at Wolf Creek and, depending on which way the wind might have blown, *radioactive fallout on this courtroom*, not to mention saving the lives of thousands

> of Kansans and preservation of the land which is the breadbasket of the world from turning into a *Chernobylesque countryside* (emphasis added).

Plaintiff's Motion to Alter or Amend the Judgment, filed May 4, 1987.

Incidentally, such inflammatory arguments point out the wisdom of Congress in choosing to commit these claims to agencies with expertise in the fields. A whistleblower claim will ultimately turn on the credibility of the whistleblower. Who decides whether a frenzied claim of an imminent nuclear holocaust is credible?

A jury, untrained in nuclear safety, could not easily disregard the threat of "radioactive fallout on this courtroom" and concentrate on the real issues in the case. The NRC, on the other hand, has trained experts who can competently investigate the charges and not be as vulnerable to pleas for astronomical damages based on hysterical visions of a "Chernobylesque countryside." Congress, for good reason, entrusted the duties of investigating the claims of nuclear whistleblowers, assessing their credibility, and evaluating questions of nuclear safety to the NRC. Congress could not have intended that the nuclear safety laws be subjected "to an unpredictable medley of jury determinations." *Rayner v. Smirl*, 873 F.2d at 66.

Congress also saw that employers need to be able to make decisions about discharging employees, especially ones who violate nuclear safety rules, without being held hostage to the threat of inflammatory arguments in vindictive law suits. Without pre-emption, discharged whistleblowers would not take their safety claims to the agencies. Like Masters, they would allow the limitations period to expire and file in state court, hoping to reap huge payoffs. Congress did not intend that the elaborate and careful blend of administrative and judicial remedies be circumvented or ignored.

III. A SPECIFIC REMEDY PRE-EMPTS GENERAL REMEDIES

In *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), this Court decided a case which is in many respects parallel to the case at bar. The Court ruled that a federal employee who had a specific remedy under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-16(c), could not bring a cause of action under the more general provisions of 42 U.S.C. § 1981. The rule applied in *Brown* was one which has been applied in a variety of circumstances before and after *Brown*. "We have consistently held that a narrowly tailored employee compensation scheme pre-empts the more general tort recovery statutes." 425 U.S. at 834-35.

In *Brown*, the petitioner had 30 days after the conclusion of his Title VII administrative proceedings to file suit in the District Court. He filed 42 days after administrative proceedings were concluded. The Supreme Court ruled that the filing was untimely. This Court also ruled that Title VII, with its carefully crafted scheme of administrative and judicial rights, was the exclusive remedy for persons coming under its provisions.

Factors supporting the Court's analysis were the following: (1) plaintiff had no clearly defined and widely accepted cause of action prior to the enactment of § 2000e-16(c) which would allow a plaintiff to seek backpay, reinstatement or other compensatory relief; (2) the law "proscribes federal employment discrimination and establishes an administrative and judicial enforcement system;" and (3) Congress did not intend that plaintiffs circumvent this remedial enforcement scheme by artful pleading. 425 U.S. at 829-833.

Since *Brown*, the Court has applied this rule in other contexts. In *Block v. North Dakota*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983), the Court unanimously ruled that because Congress had enacted the Quiet Title Act, this rule of interpretation prevented the State

of North Dakota from suing federal officials under the jurisdictional grants of federal question, mandamus, and declaratory judgment. The Court based its conclusion on factors similar to those considered in *Brown*: (1) prior to the enactment of the Quiet Title Act, there was no widely recognized remedy for persons seeking to sue the United States to quiet title to land; (2) Congress enacted a system of recovery that involved limitations and compromises which were specifically directed to the issue of quieting title with the United States; (3) the protections and privileges given to the United States under the Quiet Title Act would be rendered nugatory if plaintiffs were allowed to proceed under more general acts.

The Court in *Block* relied on *Brown*'s holding that "the 'balance, completeness and structural integrity' of the statute belied the contention that it was 'designed merely to supplement other putative judicial relief.' [425 U.S.] at 832. Thus, we applied the rule that a precisely drawn, detailed statute pre-empts the more general remedies. *Id.*, at 834. That rule is equally applicable in the present context." 461 U.S. at 285. All members of the Court agreed with this holding.

In *Jett v. Dallas Independent School District*, 491 U.S. ——, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), all members of the Court again acknowledged the rule that a more specific and detailed statute which specifically addresses the question will pre-empt a cause of action brought under a more general statute. The majority and the dissent disagreed on the application of the rule to the facts of that case, and whether Congress had initially intended to provide a private right of action against municipalities under 42 U.S.C. § 1981. No member of the Court, however, questioned the validity of the rule.

These same factors are present in the case at bar. Prior to 1978 when the Whistleblower Act was passed by Congress, employees of contractors, licensees and applicants for licenses had no specific right granted by state or federal law to bring a civil action for retaliatory dis-

charge for whistleblowing. The accepted rule was employment at will, unless some contractual obligation such as a collective bargaining agreement altered that status, and even then, there was no cause of action in tort for retaliatory discharge. A whistleblower action, unknown at common law, is solely a creature of statute. In order to recover under the Act, the employee must be participating in a proceeding under the Energy Reorganization Act or the Atomic Energy Act, or the employee must be reporting violations of the acts.

The legislative history of § 5851 implies that prior to this statutory enactment, the right of whistleblower to recover the retaliatory discharge for whistleblowing was unknown. Senate Report No. 95-848, 1978, U.S. Code Cong. & Admin. News at 7303 states, "The section *offers protection* to employees who believe they have been fired or discriminated against as a result of the fact that they have testified, given evidence, or brought suit under that act or the Atomic Energy Act" (emphasis added).

The report continued, "Under this section, employees and union officials could help assure that employers do not violate requirements of the Atomic Energy Act. . . . The section *would prohibit* any firing or discrimination and *would provide* an administrative procedure under which the employee or his representative could seek redress for any violation of this prohibition" (emphasis added). *Id.* at 7304.

The House Conference Report No. 95-1796, the joint explanatory statement of the Committee on Conference, also indicates that this was a new protection for the employees. "The Senate bill amended the Energy Reorganization Act of 1974 *to provide protection* to employees of Commission licensees, applicants, contractors, or subcontractors from discharge or discrimination for taking part or assisting in administrative or legal proceedings of the Commission" (emphasis added). *Id.* at 7309. Congress believed that prior to this enactment, the nuclear whistleblower had no right to reinstatement, backpay, or other relief. The cause of action was simply unknown.

The second factor in *Brown* and *Block v. North Dakota* is the comprehensive remedial scheme. Congress set up a comprehensive blend of administrative and judicial procedures to enforce these protections for whistleblowers. Like the statute in *Brown*, the Whistleblower Act proscribes the offensive conduct and "establishes an administrative and judicial enforcement system." 425 U.S. at 829. The legislative history summarizes the comprehensive remedial scheme. "The Secretary of Labor would investigate such charges and issue findings and a decision which would be subject to judicial review. If the Secretary should find a violation, he would issue orders to abate it, including, where appropriate, the rehiring of the employee to his former position with backpay. Also, the person committing the violation could be assessed the costs incurred by the employee to obtain redress." Senate Report 95-848, 1978, U.S. Code Cong. & Admin. News at 7304.

The third factor considered in the analysis of this principle is whether the allowance of extra-statutory remedies would upset the balance and compromise which Congress hammered out. In establishing the remedial scheme, Congress balanced competing interests of the employer and the employee, to further the goals of a just result for all parties and the promotion of safety in nuclear radiation. The legislative history addresses this point.

> This provision would safeguard the rights of employees, but it should not encourage employees to frivolously allege violations since the employee would have to pay the costs of the proceedings unless the violation is proved.
>
> In order to avoid abuse of the protection afforded under this section, the committee has added a provision which would deny its applicability to any employee who, without direction from his employer, deliberately violates or willfully contributes to a violation of any standard, requirement, or regulation under the Act.

Id.

The protections afforded coal miners under the Federal Coal Mine Health and Safety Act of 1969, Public Law 91-173, and expanded to include all miners, their representatives, and applicants for employment under the Federal Mine Safety and Health Amendments Act of 1977, Public Law 95-164, are similar to those granted to employees under 42 U.S.C. § 5851. The legislative history stating the purpose of those laws is significant in determining the purpose of § 5851.

In fashioning a remedy for whistleblowing miners, Congress set a short time limit for bringing the claim "to avoid stale claims being brought." Senate Report No. 95-181, 1977, U.S. Code Cong. & Admin. News at 3436. The Senate Report also states that the time limit:

> should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which would warrant the extension of the time limit would include a case where the miner within the 60 day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

Id.

Thus, the 30-day limitation period in the Energy Reorganization Act is deliberately short to avoid stale claims, yet it is not jurisdictional. It may be extended under the circumstances set out by Congress in the legislative history of the Federal Mine Safety and Health Amendments Act of 1977. Furthermore, in complying with this short limit, the employee can be restored to his prior position, with a minimum of personal hardship.

Congress balanced the competing interests in Section 5851. It protects the employee's right to blow the whistle, while it also protects the employer's right to discipline or dismiss an employee for causing a safety hazard or violating safety rules, without fear of a vindictive multimillion dollar lawsuit. It allows an aggrieved employee a speedy remedy while it protects the employer from

stale claims. It affords the employee complete remedy including make-whole relief, reinstatement, and compensatory damages and costs, while it protects the employer from punitive damages, unless the employer violates an order of the Secretary.

Just as in *Brown*, to allow a plaintiff to spurn the comprehensive, and carefully crafted remedy set up by Congress, in favor of a remedy under a more general statute in a state court action, would upset the balance which Congress struck and eviscerate the protections that Congress afforded the employer. The Court's analysis in *Brown* is equally applicable here.

> The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. His view fails, in our estimation, to accord due weight to the fact that unlike these other supposed remedies, § 717 does not contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement powers. Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible. The crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination would be eliminated "by the simple expedient of putting a different label on [the] pleadings." *Preiser v. Rodriguez*, 411 U.S. 475, 489-490, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading (footnote omitted).

425 U.S. at 832-33.

CONCLUSION

The Supreme Court of Kansas has ruled that the Whistleblower Act provides petitioner a "substantial and effective remedy," and Kansas would not recognize a new public policy exception to the doctrine of employment at will for petitioner's circumstances. There is no state claim to pre-empt.

Congress has granted to the NRC exclusive authority over the construction of nuclear power plants insofar as it relates to radiological safety. The Whistleblower Act is part of the pre-empted field. The Tenth Circuit properly ruled that petitioner's claim for retaliatory discharge for reporting nuclear safety violations is pre-empted.

Congress has drafted a carefully balanced blend of administrative and judicial remedies specifically for nuclear whistleblowers. Petitioner may not, by artful pleading, circumvent this remedial scheme, and bring a claim under the common law of Kansas.

For these reasons, this Court should deny the petition for writ of certiorari to the Tenth Circuit.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RONALD MASTERS,

Petitioner,

v.

DANIEL INTERNATIONAL CORPORATION

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 89-1701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RONALD MASTERS,

Petitioner,

v.

DANIEL INTERNATIONAL CORPORATION

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. WHETHER KANSAS WOULD RECOGNIZE A CAUSE OF ACTION FOR RETALIATORY DISCHARGE IS NOT BEFORE THIS COURT, AND THUS IS NOT A REASON TO DENY CERTIORARI.

While Petitioner disagrees with many statements made in "Respondent's Brief In Opposition To The Petition For Writ Of

Certiorari," Petitioner will adhere to rules permitting a reply brief only to issues first raised in the brief in opposition.

Respondent suggests this Court should not grant certiorari because Kansas would not recognize a claim for petitioner's retaliatory discharge. That argument assumes the outcome of a question appealed to but not decided by the Tenth Circuit. Respondent acknowledges that "[b]ecause of its holding on the pre-emption issue, the Tenth Circuit did not reach the question of whether Masters had stated a valid claim for retaliatory discharge...." (Respondent's Brief at p. 3). Accordingly, the question of whether Kansas would recognize Ron Masters' cause of action for retaliatory discharge is not a question before this Court.

If certiorari is granted and the Tenth Circuit is reversed on the issue of

federal preemption, then this Court would undoubtedly remand for determination by the Tenth Circuit (or by the Kansas Supreme Court on certification of a question of law) of the state law question.

Nevertheless, since Respondent has argued the issue, if the Court considers the issue important then Petitioner responds as follows.

Kansas has recognized the tort of retaliatory discharge. Palmer v. Brown, 242 Kan. 893, 752 P.2d 685 (1988). Respondent contends that if a discharged employee had another remedy, then Kansas would not recognize a cause of action for retaliatory discharge. We will herein refer to this as the "other available remedy" exception.

Despite several opportunities, Kansas appellate courts have never adopted the "other available remedy" exception to the

tort of retaliatory discharge. Moreover, the Kansas Supreme Court itself appears indecisive in drawing the parameters of the tort. See Coleman v. Safeway Stores, Inc., 242 Kan. 804, 752 P.2d 645 (1988), overruling Cox v. United Technologies, Inc., 240 Kan. 95, 727 P.2d 645 (1986). Cox had reasoned that because a collective bargaining agreement provided a grievance procedure, which included binding arbitration (i.e. an "other available remedy"), employees covered by such agreements could not avail themselves of the state tort of retaliatory discharge. Less than two years later, the Kansas Supreme Court in Coleman rejected that reasoning and overruled Cox.

Coleman could have adopted the "other available remedy" exception but did not. Coleman discussed the inadequacy of arbitral procedures, specifically their inappropriateness for the resolution of

tort claims. The court discussed the significance of a retaliatory discharge case where the focus is on the employer's motive for the firing and the impact upon the employer-employee relationship, not the industrial unionized concerns. Coleman stated that the "grievance and arbitration procedure is an inappropriate forum for the enforcement of state public policy...." Id., 242 Kan. at 813, 752 P.2d at 651, and held that arbitral procedures, while well suited to the resolution of contractual disputes, are comparatively inappropriate for the resolution of state tort claims. Although Coleman had an available arbitration process and appeal procedure, the court found that the remedy was inadequate and that the availability of another remedy did not bar the state tort action.

So too here, in light of Coleman it is highly unlikely the Kansas Supreme

Court would adopt the "other available remedy" exception. If the arbitral procedures in Coleman were inappropriate for enforcement of public policy, the administrative procedure in § 210 is likewise inappropriate. Coleman grouped cases of retaliatory discharge into three classes: (1) cases in which employees are discharged for refusing to violate criminal statutes; (2) cases in which employees are discharged for exercising a statutory right; and (3) cases in which employees are discharged for complying with a statutory duty. All three classes apply here. Further, the remedy under § 210 is certainly limited and highly inadequate in light of the extraordinarily short 30-day statute of limitations and the unavailability of punitive damages. Instead of § 210 acting to vindicate employee claims as intended by Congress, it is being used as a sword by employers

to defeat meritorious state law claims; employers are twisting the "employee protection" of § 210 into employer protection.

In Chrisman v. Philips Indus., 242 Kan. 772, 751 P.2d 140 (1988), the Kansas Supreme Court had another opportunity to embrace the "other available remedy" exception, but the case was decided on the basis of § 210 federal preemption instead.

Adoption of the "other available remedy" exception in Kansas would mean that any time a federal statute permits an administrative procedure, then Kansas must refuse to provide redress to its citizen. Why would any properly informed state court of last resort, which has recognized the tort of retaliatory discharge to protect important aspects of public policy, choose to voluntarily withdraw jurisdiction from state courts and instead yield complete control over all such cases

to a federal administrative procedure? Adoption of the "other available remedy" exception is completely at odds with the assertion and protection of the sovereignty of the states which is the very essence of federalism.

Moreover, withdrawing the tort of retaliatory discharge from state courts and supplanting it with a federal administrative procedure creates the state and federal constitutional issues already previously raised herein: separation of powers, jury trial, and due process (quid pro quo). The Kansas Supreme Court has never been presented with or decided any of the above arguments.

Respondent cites Polson v. Davis, 895 F.2d 705 (10th Cir. 1990), as support for its argument that Kansas would adopt the "other available remedy" exception to the tort of retaliatory discharge. Maureen Polson was an employment supervisor

employed by the City of Kansas City, Kansas, who alleged her employment was terminated in retaliation for her objections to the City's discriminatory hiring practices. Polson held that plaintiff's remedies under Kansas statutory law (Kansas Acts Against Discrimination, K.S.A. 44-1001 et seq, [KAAD]) preclude recovery under the tort of wrongful discharge. The result in Polson is contrary to the result in Pilcher v. Board of Wyandotte County Comm'rs, 14 Kan.App.2d 206, --- P.2d --- (1990), wherein the Kansas Court of Appeals recognized a cause of action for retaliatory discharge in favor of a county case worker who alleged employment termination because her superiors believed she was the source of an article in the Kansas City Times which was highly critical of the county's hiring practices. No mention was made of KAAD in Pilcher.

One would think that if KAAD was plaintiff's exclusive remedy as held by the Tenth Circuit in Polson, then the Kansas Court of Appeals would have at least mentioned it in Pilcher.

Further, the court in Polson recognized the differences of opinion among Kansas United States District Court Judges Theis, O'Connor, and Rogers on this issue. (895 F.2d at 709). The Court also said the issue is "clouded" by Kansas Supreme Court cases. Id.

Accordingly, it appears only Kansas federal courts, not Kansas state courts, have employed the "other available remedy" exception to dismiss cases of retaliatory discharge.

After arguing that Kansas would adopt the "other available remedy" exception, at least where that remedy is adequate, Respondent then states the Kansas Supreme

Court has already "ruled" on the adequacy of a § 210 remedy in Chrisman v. Philips Industries, Inc., 242 Kan. 772, 751 P.2d 140 (1988). Yet respondent acknowledges the Kansas Supreme Court held:

> "We need not determine whether termination of an employee for 'whistleblowing' in nuclear and related industries violates state public policy or whether further exception to the employment-at-will doctrine should be created. Congress has provided the exception by legislation, which we hold preempts the field."

Id., 242 Kan. at 780, 751 P.2d at 145. The gratuitous statement in Chrisman that § 210 provides a substantial and effective remedy is pure dicta. The adequacy of a § 210 remedy was not at issue in Chrisman and there is no indication such was necessary or essential to determination of the question of federal preemption.

As the question of whether § 210 preempts state law claims is a matter of

federal law [Snow v. Bechtel Construction, Inc., 647 F.Supp. 1514, 1517-19 (C.D.Cal. 1986)], and as this Court has now ruled in English v. General Electric Co., --- U.S. --- (Case No. 89-152, 6/4/90), that § 210 does not preempt state law claims, Kansas is now free to provide its citizens with redress in its courts. When this Court reverses and remands the case at bar back to the Tenth Circuit based on English, then the Tenth Circuit (or, more appropriately, the Kansas Supreme Court on certification of a question of law) will have to determine whether to allow an action for retaliatory discharge under the facts herein and in view of the arguments made in this case.

Respondent at p. 8 of its Brief claims "nothing has called into question the District Court's opinion that Masters failed to state a claim for retaliatory

discharge in violation of public policy under Kansas law." The appeal to the Tenth Circuit in this case calls that opinion into question. Also, the District Court below relied heavily on Cox v. United Technologies, Inc., 240 Kan. 95, 727 P.2d 645 (1986), but Cox was then reversed by the Kansas Supreme Court in Coleman v. Safeway Stores, Inc., 242 Kan. 804, 752 P.2d 645 (1988). And the Kansas Supreme Court first recognized the cause of action for retaliatory discharge in Palmer v. Brown, supra, decided one month after the District Court's decision below. This Court cannot assume Kansas would not recognize Petitioner's claim for retaliatory discharge and deny certiorari on that basis.

At p. 4 of its Brief, Respondent asserts that "...Masters abandoned his claim for intentional infliction of emotional distress...." This is not true;

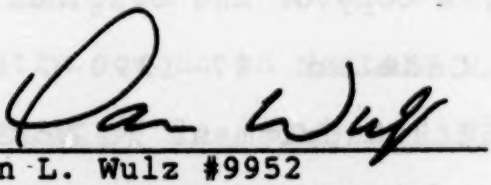
in fact, leave to amend to assert intentional infliction of emotional distress was recently sought in Masters v. Kansas Gas & Electric Co. and Daniel International Corp. et al., D.C.Kan. Case No. 87-1290-C, based upon a recent diagnosis of post-traumatic stress disorder resulting from Petitioner's mistreatment by Respondent and others. As indicated in footnote no. 4 to the Petition For Writ Of Certiorari herein at pp. 30-31, since the instant case was dismissed for failure to state a claim, was dismissed without prejudice, and with leave to proceed on the complaint filed in Case No. 87-1290-C, Masters has done so. [See the district court's Memorandum and Order below, Masters v. Daniel International Corp., Case No. 86-4268-R (Memorandum and Order, 2/25/88, unpublished, Rogers, J.), Appendix To

Petition For Writ Of Certiorari at App. 33; a copy of the original Complaint filed in Case No. 87-1290-C is attached to "Fifth Supplement To Motion To Alter Or Amend, Doc. #54, 9/16/87]. Petitioner has not "abandoned" any claims, and the appeal in the instant case was taken only out of an abundance of caution. If the federal preemption ruling herein be reversed, we expect remand for trial with D.C.Kan. Case No. 87-1290-C of all claims.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that the Court grant this Petition and issue its writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the opinion of that court in Petitioner's case.

Respectfully submitted,



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